

United States
Circuit Court of Appeals
1093
For the Ninth Circuit,

CITY OF BOZEMAN, a Corporation, JOHN A. LUCE, Mayor of the City of Bozeman, and C. A. SPIETH, City Clerk of the City of Bozeman,

Appellants,

vs.

SWEET, CAUSEY, FOSTER & COMPANY, a Corporation, JAMES N. WRIGHT & COMPANY, a Corporation, and C. W. McNEAR, & COMPANY, a Corporation,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Montana.

Filed

APR 7 - 1917

F. D. Monckton,
Clerk.

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Circuit Court of Appeals
For the Ninth Circuit.

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LUCE, Mayor of the City of Bozeman, and
C. A. SPIETH, City Clerk of the City of
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Solicitors of Record.

H. D. KREMER, Esq., and GEORGE Y. PATTEN,
Esq., of Bozeman, Montana,

Solicitors for Defendants and Appellants.

Messrs. DAY & MAPES, of Helena, Montana,
Solicitors for Plaintiffs and Appellees.

[1*]

*In the District Court of the United States in and for
the District of Montana.*

IN EQUITY—No. 77.

SWEET, CAUSEY, FOSTER & COMPANY,
JAMES N. WRIGHT & COMPANY, a Cor-
poration, and C. W. McNEAR & COMPANY,
a Corporation,

Plaintiffs,

vs.

CITY OF BOZEMAN, a Corporation, and JOHN
A. LUCE, Mayor of the City of Bozeman, and
C. A. SPIETH, City Clerk of the City of
Bozeman,

Defendants.

BE IT REMEMBERED, that on July 14, 1916,
the plaintiffs filed their Bill of Complaint herein, in
the words and figures following, to wit: [2]

*Page-number appearing at foot of page of original certified Transcript
of Record.

*In the District Court of the United States, District
of Montana, Helena Division.*

IN EQUITY—No. —.

SWEET, CAUSEY, FOSTER & COMPANY, a
Corporation, JAMES N. WRIGHT & COM-
PANY, a Corporation, and C. W. McNEAR,
& COMPANY, a Corporation,

Plaintiffs,

vs.

CITY OF BOZEMAN, a Corporation, and JOHN
A. LUCE, Mayor of the City of Bozeman, and
C. A. SPIETH, City Clark of the City of
Bozeman,

Defendants.

Bill of Complaint.

Come now the plaintiffs above named, and for
cause of action against the above-named defendants
showeth unto your Honor:

1. That the plaintiff Sweet, Causey, Foster &
Company was at all the times hereinafter mentioned
and still is a corporation organized and existing un-
der the laws of the State of Delaware and a citizen
of the State of Delaware; that the plaintiff James
N. Wright & Company was at all the times herein-
after mentioned and still is a corporation organized
and existing under the laws of the State of Dela-
ware and a citizen of the State of Delaware; that
the plaintiff C. W. McNear & Company was at all
the times hereinafter mentioned and still is a corpo-
ration organized [3] and existing under the laws

of the State of Illinois and a citizen of the State of Illinois.

2. That the defendant City of Bozeman was at all the times hereinafter mentioned and still is a municipal corporation organized and existing under the laws of the State of Montana; that the defendant John A. Luce was at all the times hereinafter mentioned and still is the duly elected, qualified and acting mayor of the said City of Bozeman and a citizen of the State of Montana; that the defendant C. A. Spieth was at all the times hereinafter mentioned and still is the duly appointed, qualified and acting city clerk of the said City of Bozeman and a citizen of the State of Montana.

3. That this is a suit in equity between citizens of different states, and the matter in controversy, exclusive of interest and costs, exceeds the sum or value of three thousand dollars.

4. That, pursuant to the powers vested in municipal corporations of the State of Montana by the laws of said state, the duly elected, qualified and acting city council of said City of Bozeman, at a special meeting thereof duly held at the council chambers thereof in the City of Bozeman on the 28th day of February, 1916, duly and legally passed and enacted a certain resolution, known as Resolution No. 695, by the affirmative vote of all of the members thereof, the vote being by ayes and noes, and which said resolution was thereafter on said date approved by the mayor of said city, providing for the holding of a special election submitting to the taxpayers of the said city the question of the city issuing Water

Works Bonds upon the credit of the city, in the sum of two hundred thirty-five thousand dollars (\$235,000), the proceeds from [4] the sale thereof to be used as follows, to wit, one hundred thousand dollars (\$100,000), in redeeming the present outstanding Water Works Bonds, and the balance in extending, improving and enlarging the existing Water Works System and in acquiring an auxiliary or additional Water Works System from Bozeman Creek for the said city, a copy of which said resolution is hereto attached as Exhibit "A" and made a part hereof the same as if set forth at length herein.

That thereafter, at the same meeting and pursuant to the same powers, the city council duly and legally passed and enacted a certain other resolution, known as Resolution No. 696, by the affirmative vote of all the members thereof, the vote being by ayes and noes, and which resolution was thereafter on said date approved by the mayor of said city, providing for the holding of a special election for the purpose of submitting to the taxpayers of the City of Bozeman the question of the city issuing sewer bonds upon the credit of the city in the sum of seventy thousand dollars (\$70,000), the proceeds from the sale thereof to be used in extending, improving and enlarging the existing sanitary sewer system and storm sewer system of the City of Bozeman, a copy of which said resolution is hereto attached as Exhibit "B" and made a part hereof the same as if set forth at length herein.

5. That by the terms of said resolutions a special election was ordered to be held at the time of the gen-

eral spring election on April 3, 1916, for the purpose of ascertaining the will of the taxpayers to be affected thereby; that it was provided in said resolutions that separate ballots should be used for such special election, on one of which should be printed the terms "Water Works Bonds, [5] Bonds—Yes, Bonds—No," and on the other the terms "Sewer Bonds, Bonds—Yes, Bonds—No."

6. That under and by virtue of the provisions of said resolutions the city clerk was authorized and directed to give notice of such election as required by law, and said notice was given by posting in five public and conspicuous places in each ward throughout the said city, was also published in the "Weekly Courier," a weekly newspaper published in said city, once a week for five consecutive weeks, the first publication being on the 1st day of March, 1916, and the last publication being on the 29th day of March, 1916, and which said notices so posted and published were in words and figures as follows, to wit:

NOTICE.

SPECIAL CITY ELECTION.

Notice is hereby given that a special city election will be held in the City of Bozeman, State of Montana, at the time of holding the regular spring election, to wit: Monday, April 3, A. D. 1916. The polls to be open continuously from and including eight o'clock A. M., to and including six o'clock P. M. of said day. The polling places to be as follows: For the First Ward, being Precinct No. 1, at the Bozeman Hotel Annex; and the Second Ward, being Pre-

cinct No. 4, at the Court House; for the Third Ward, being Precinct No. 3, at the office of the Kenyon-Noble Lumber Company; and for the Fourth Ward, being Precinct No. 2, at the Council Chamber of the City of Bozeman.

Said special election will be held for the purpose of submitting to the taxpayers, as defined by Sections 468 and 469 of the Revised Codes of Montana, 1907, who are also possessed of the qualifications of electors in the said City of Bozeman, the question of the said city issuing Water Works Bonds upon the credit of the said city in the sum of \$235,000.00, the proceeds from the sale thereof to be used as follows: \$100,000.00 for redeeming the present outstanding Water Works Bonds and the balance in extending, improving and enlarging the present water works system and acquiring an auxiliary or additional water works system from Bozeman Creek for the City of Bozeman.

The amount of bonds proposed to be issued is the sum of \$235,000.00, and the character of the said bonds, is as follows: They shall be known as "Water Works Bonds"; shall be dated July 1, 1916; shall be of the denomination of one thousand dollars each and shall bear interest at a rate not exceeding five per cent per annum; interest payable semi-annually on the first days of January and of July in each year; shall be payable in twenty years and [6] redeemable in ten years. And the particular purpose for issuing said bonds is: First, to redeem the present outstanding water works bonds in the sum of \$100,000.00. Second: to extend, improve and en-

large the present water works system and acquire an auxiliary or additional water works system from Bozeman Creek, for the City of Bozeman, Montana.

At such election, the ballots shall contain the words:

“Water Works Bonds.”

“Bonds Yes.”

“Bonds No.”

And in voting the elector must make a cross thus “X” opposite the answer for which he intends to vote.

Dated at the office of the city clerk of the City of Bozeman, Montana, this 28th day of February, 1916.

C. A. SPIETH,

City Clerk.

That the notice with reference to the special election concerning the issuance of said Sewer Bonds was identical in terms as the notice last above set forth, except that it substituted the denominations and amounts of the bonds and the purposes for which they were proposed to be issued in connection with extending, enlarging and improving the sewer systems of said city.

7. That the said special election was held at the time of the general city election for said city on the 3d day of April, 1916, and at said election separate ballots and separate ballot-boxes, election books, sheets and certificates were used, and all voting and votes upon each of said questions were upon separate ballots, and the questions so submitted were voted upon separately at said election, and the counting of the ballots and the certification thereof, and

the canvass of the votes therefor, were all had and done separately with reference to each of the said questions; that at a meeting of the city council held on the 6th day of April, 1916, being the regular meeting following said election, the city council adjourned to meet in regular adjourned session on April 7, 1916, at which time the returns of said special election were [7] canvassed and the result thereof determined as follows, to wit, for the Water Bonds, "yes," 224; "no," 132; for the Sewer Bonds, "yes," 239; "no," 116; that from said canvass it appeared that the question of issuing the Water Bonds had carried by a majority of ninety-two (92), and the question of issuing the Sewer Bonds had carried by a majority of one hundred twenty-three (123).

8. That at the time of holding said special election [8] the said City of Bozeman was indebted in an amount exceeding the three per cent limit provided for by the Constitution and laws of the State of Montana, and that the question of extending the constitutional limit of indebtedness of said city for the purpose of procuring a water supply for its inhabitants, or constructing a sewer, was not submitted to the taxpayers affected thereby, as required by the Constitution and laws of the State of Montana, at said election, or at any election held prior thereto or thereafter; nor was the said question ever submitted to the taxpayers affected thereby except as hereinabove set forth.

9. That thereafter at a special meeting held on the 7th day of April, 1916, the city council, pursuant

to authority conferred by statute, appointed the 18th day of May, 1916, at 7:30 o'clock P. M., in the City Hall Building in the City of Bozeman, as the time when and the place where the issue of \$235,000 of Water Works Bonds and the \$70,000 of Sewer Bonds should be offered for sale at public auction, and the city clerk was directed to give notice of such sale by advertisement in the "Weekly Courier," a weekly newspaper published in said city, and in the "Financier," a weekly newspaper published in the City of New York, for four weeks before the 18th day of May, 1916, which said notice as directed to be given and as actually given was in words and figures as follows, to wit:

BONDS FOR SALE.
CITY OF BOZEMAN,
MONTANA.

\$235,000 5% Water Works Bonds.

Notice is hereby given that the City of Bozeman, in the State of Montana, will sell at public auction on Thursday, May 18, 1916, at seven-thirty o'clock P. M., at the Council Chamber in the City Hall Building in said City, the water works bonds of said City to the amount of [9] \$235,000, the said bonds to be of the denomination of One Thousand Dollars each; to be dated July 1, 1916; to be payable in twenty years and redeemable at the option of said City at any time after ten years and to bear interest payable semi-annually at a rate of five per cent per annum, the proceeds from the sale of said bonds to be used for the purpose of redeeming the present outstanding water works bonds in the sum of

\$100,000, and the balance in extending, improving and enlarging the present water works system and acquiring an auxiliary or additional water works system from Bozeman Creek for said City of Bozeman.

Said bonds will be sold to the highest bidder offering the highest price for them and said bonds will be sold at not less than their par value.

A copy of the verified transcript of all of the proceedings pertaining to this bond issue together with a financial statement of the said City of Bozeman, will be furnished upon application, to all prospective bidders.

Dated at Bozeman, Montana, April 12, 1916.

C. A. SPIETH,
City Clerk.

That the notice with reference to the sale of the said Sewer Bonds was identical in terms as the notice last above set forth, except that it substituted the denominations and amounts of the bonds as provided by the resolution for the sale of the Sewer Bonds.

10. That thereafter and pursuant to authority conferred by statute, the said city council, at its regular meeting held on the 7th day of April, 1916, duly and regularly passed and enacted an ordinance, known as Ordinance No. 456, being an ordinance directing the issuance of Water Works Bonds to the amount of \$235,000, a copy of which said ordinance is attached hereto as Exhibit "C" and made a part hereof the same as if set forth at length herein.

That at the same meeting and pursuant to the same authority the said city council duly and reg-

ularly passed and enacted an ordinance, known as Ordinance No. 457, being an ordinance directing the issuance of Sewer Bonds to the amount of \$70,000, a copy of which said ordinance is hereto attached as Exhibit "D" and made a part hereof the same as if set forth at length herein. [10]

11. That pursuant to said notices of sale the plaintiffs herein applied to and received from the city clerk of said city, under the seal thereof, the financial statement of said city, under date of April 1, 1916, a copy of which said financial statement is hereto attached as Exhibit "E" and made a part hereof the same as if set forth at length herein; that by said statement it appeared that the assessed value of the real estate and personal property within the City of Bozeman, as shown upon the assessment-roll for the year 1915, was \$3,209,196, and that the outstanding indebtedness of said city, exclusive of the indebtedness of Improvement Districts, was, at the time of holding said election, the sum of \$351,802.62.

12. That on the 18th day of May, 1916, the city council of said city met in regular session at the council chambers at 7:30 o'clock P. M., for the purpose of conducting the sale of said Waterworks and Sewer Bonds, and that the defendant John A. Lucé, as the mayor of said city, called the meeting to order and announced that the successful bidder for said bonds would be required to enter into a written contract with the City of Bozeman immediately upon the conclusion of the sale of said bonds, binding himself to take such bond issue or issues at the

amount or amounts bid, and that he would have two weeks in which to examine into the legality of the proceedings pertaining to said bond issues, and must then announce his acceptance or rejection thereof, as to the legality of said proceedings, and if he then asserted that said proceedings were illegal, he must in fact establish such illegality; that if the proceedings were in fact legal and the purchaser refused to accept the bonds at the purchase price thereof, then the city would retain the amount of [11] the certified checks of the successful bidders as liquidated damages, but if the proceedings were in fact illegal the said bidder would not be required to take the said bonds and pay the purchase price thereof; that at said meeting these plaintiffs attended by their agent and bid for said bonds par and accrued interest, and for the Water Works Bonds a premium of \$9,595.00, and for the Sewer Bonds a premium of \$2,835.00; that the bid of these plaintiffs, being the highest bid, was accepted, and, upon motion duly made and passed by the affirmative vote of all the members of said city council, the mayor and city clerk were authorized to enter into a contract with these plaintiffs as per the terms and conditions of the auction sale; that thereafter a contract in accordance with the vote of said city council was entered into between said city and these plaintiffs for the purchase of said bonds, which said contract was in words and figures as follows, to wit:

AGREEMENT.

THIS AGREEMENT, made and entered into this 18th day of May, 1916, by and between the City of

Bozeman, a municipal corporation of the State of Montana, the party of the First Part, and Sweet, Causey, Foster & Company, James N. Wright & Company, of Denver, Colorado, and C. W. McNear & Company, of Chicago, Ill., the parties of the second part; WITNESSETH:

WHEREAS, pursuant to public proposals therefore made by the party of the first part, an auction sale was had thereon, on even date herewith, whereby the parties of the second part became the purchasers of \$305,000.00 municipal bonds of said first party at and for the par value thereof, to wit, said sum of \$305,000.00 and in addition thereto a premium of \$12,430.00.

NOW, THEREFORE, in consideration of the mutual benefits to be derived by the respective parties in the premises, it is agreed that the parties of the second part will have two weeks in time from the receipt of the transcripts pertaining to said bond proceedings, from the date of the receipt of such transcripts by said second party in which to examine into the legality thereof, and then and there they must announce their acceptance or rejection thereof as to the legality of said proceedings. If the parties of the second part thereupon assert that said proceedings are illegal they must in fact establish such illegality. And if the proceedings are in fact legal, and said second parties refuse to accept said bonds at said purchase price then [12] and in that event the party of the first part is hereby authorized to take and keep and retain the amount of the certified checks deposited with said first part as

liquidated damages, but if said proceedings are in fact illegal or either of them so, then and in that event said second party shall be under no obligation to take said bonds and pay the purchase price therefor and said first party shall immediately thereon return the amounts of said certified checks in the sum of \$4,000.00 to the parties of the second part.

The parties of the second part shall furnish to the party of the first part proper and sufficient blank bonds with coupons thereto attached in all respects complete for execution, for each of said issues free of expense.

If for any reason the parties of the second part shall not deliver and pay over to the party of the first part said purchase price of said bonds, including said premium bid, upon the date of the issuance of said bonds, then and in that event the parties of the second part shall pay to the party of the first part interest at the rate of 5% per annum from the date of said bonds to the date of delivery in addition to said purchase price of said bonds including said premium.

The party of the first part agrees to promptly take such steps to make these issues legal as may be required and deemed necessary by the attorneys of the parties of the second part, and prior to the delivery of the bonds to the parties of the second part to promptly furnish them with evidence of the legality of the issues in form satisfactory to their attorneys, and to deliver the properly executed bonds to the parties of the second part either in Denver, Colo.,

or in Chicago, Ill., at the option of the parties of the second part, free of exchange and collection charges.

IN WITNESS WHEREOF, the party of the first part has caused its name and seal to be affixed hereto, by its Mayor and City Clerk duly authorized and the parties of the second part have signed the same by their duly authorized representative, the day and year in this instrument first above written.

THE CITY OF BOZEMAN, MONTANA.

By JOHN A. LUCE,
Mayor.

[Seal]

Attest: C. A. SPIETH,
City Clerk.

SWEET, CAUSEY, FOSTER, a Co.

JAS. N. WRIGHT & CO.

C. W. McNEAR & CO.

By L. E. TORRENCE,
Representative.

That pursuant to the terms of said contract and as a part of said bid these plaintiffs delivered to the defendant C. A. Spieth, as city clerk of said city, two certified checks drawn upon the Interstate Trust Company, of Denver, Colorado, for the sum of \$2,000.00 each, payable to the order of the City of Bozeman, in accordance with [13] the terms of said contract, as security for the compliance with the said terms on the part of these plaintiffs.

13. That immediately after the execution of said contract and on the 26th day of May, 1916, the City of Bozeman, acting through its mayor, the defendant

John A. Luce, submitted to these plaintiffs a certified transcript of the proceedings of said city council relative to the issuance of said bonds, which said certified transcript was received by these plaintiffs at the City of Denver on the 27th day of May, 1916; that thereafter and within the two weeks specified in said contract, the plaintiffs submitted the legality of said issue of bonds to their attorneys, Messrs. Pershing, Titsworth & Fry, being attorneys engaged in the practice of law in the City of Denver, Colorado, and familiar with the questions involved, and received from said firm of attorneys an opinion advising these plaintiffs that said issue of bonds was illegal; that within the period of two weeks after the furnishing of the transcript of said proceedings these plaintiffs notified the City of Bozeman and the defendant John A. Luce, its mayor, that their attorneys had declined to approve the legality of said proceedings, and, on June 10, 1916, transmitted to said city and the defendant John A. Luce, its mayor, the written opinion of said attorneys, advising the City of Bozeman that said issue of bonds was illegal because the issuance thereof would create an indebtedness in excess of the constitutional limit of indebtedness as prescribed by the Constitution of the State of Montana, and because the question of issuing refunding bonds and new bonds for the purpose of procuring an additional water supply was a double question and had been submitted as one question to the taxpayers affected [14] thereby, and that said taxpayers had not been afforded an opportunity to vote upon the

question of issuing new Water Works Bonds as a separate proposition.

14. That prior to the commencement of this action, and on the 20th day of June, 1916, these plaintiffs demanded of the defendant City of Bozeman and of the defendant C. A. Spieth, its city clerk, the return of the certified checks theretofore delivered by these plaintiffs to said defendant Spieth, or a compliance with the provisions of said contract to the effect that said city would promptly take such steps as might be required and deemed necessary to make the issue of bonds sold to these plaintiffs legal, but that notwithstanding said demand the defendant City of Bozeman has failed and refused to take any steps relative to curing the defects in the issuance of said bonds, and the defendant John A. Luce, as Mayor, and the defendant C. A. Spieth, as city clerk, of said city, have failed and refused to return to these plaintiffs the two certified checks so delivered to them, but, on the contrary, as these plaintiffs are advised and believe, said defendants Luce and Spieth have attempted to negotiate said certified checks and to deposit the money thus received in the city treasury of the City of Bozeman as forfeited to said city, and that said city has failed and refused, and still fails and refuses, to issue to these plaintiffs legal bonds of the denominations and amounts specified in said bid and award, as evidenced by said contract, or to return to these plaintiffs said certified checks.

15. That these plaintiffs are advised by their attorneys, and believe, that said proposed issue of

bonds for both water works and sewer purposes is in fact illegal in [15] the following particulars, to wit:

(a) That at the time of the submission of the question of the issuance of said bonds to the taxpayers affected thereby said City of Bozeman was indebted in excess of three per cent of the taxable value of the property of said city as the same appeared upon the assessment roll of said city for the year 1915, which fact will more fully appear by reference to the financial statement of said city attached hereto and heretofore referred to as Exhibit "E"; that the question of extending the limit of indebtedness of said city for the purpose of procuring a water supply or the construction of sewers in excess of the three per cent limit of the taxable property and within the limit of ten per cent of the taxable property, as provided by the Constitution of the State of Montana, was never submitted to the taxpayers affected thereby.

(b) That the issuance of the \$235,000 of Water Works Bonds and \$70,000 of Sewer Bonds would in fact increase the indebtedness of said city beyond the thirteen per cent limit of indebtedness as fixed by the Constitution of the State of Montana, assuming that the question of extending the limit of indebtedness beyond the three per cent limit had been properly submitted to the taxpayers.

(c) That the question of the issuance of the \$235,000 of Water Works Bonds, of which \$100,000 were to be used for funding bonds, and \$135,000 for the construction of additions to the water supply, was

a double question, and was submitted to the taxpayers of said city as one question, and that the taxpayers affected thereby were never permitted the opportunity of expressing their will upon the two separate questions.

16. That these plaintiffs are corporations engaged [16] in the business of dealing in municipal securities such as those hereinbefore referred to, and in buying such securities and selling them in the open market in various parts of the United States to persons desiring to invest in such securities; that the market for such securities depends entirely upon the validity of the issuance of the securities thus offered for sale, and that the question of their legality depends largely upon the opinion of attorneys of known reputation and learning with reference to such securities, and that without such opinions it is impossible to sell said securities in the open market to advantage; that the value of such securities fluctuates from time to time, and that unless delivery of the securities purchased is made within a short time after the purchase thereof damage is liable to be done to the purchaser by reason of such variation in the market and inability to supply customers, which said damage cannot readily be ascertained or measured by money values; that if said issue of bonds so purchased from said City of Bozeman is legal, the plaintiffs are desirous of receiving the same promptly in order that they may be supplied to their customers; that if the delivery of said bonds is arbitrarily withheld for a length of time these plaintiffs would suffer a loss which could not be adequately

measured or compensated by the payment of money damages; that these plaintiffs bid for both the Water Works and Sewer Bonds as one issue, and the amount of the bonds to be delivered was one of the considerations moving the plaintiffs to bid thereon; that these plaintiffs are willing and ready to accept said bonds if this court decrees the same to be legal and valid outstanding obligations of said City of Bozeman, and offers to pay the purchase price thereof upon the delivery of said bonds [17] properly executed; that the action of said City of Bozeman and the defendants Luce and Spieth as its executive officers, in failing and refusing to commence any proceedings to determine the validity and legality of said bonds or to return to these plaintiffs their certified checks is arbitrary and against good conscience and violative of the rights of these plaintiffs as fixed by the acceptance of their bid for said issue of bonds.

17. That these plaintiffs are advised and believe that the defendants will, unless restrained by order of this Court, sell and deliver said issue of bonds to other persons and cash or negotiate the said certified checks and forfeit the proceeds thereof into the city treasury of the City of Bozeman and thus deprive these plaintiffs of both the delivery of said bonds and the return of said certified checks.

18. That the plaintiffs have no adequate remedy at law in the premises.

WHEREFORE, plaintiffs pray:

1. That this Court may determine whether or not the issue of bonds so sold to these plaintiffs and the proceedings incident thereto are legal and valid.

2. That if the issue of bonds hereinabove described be adjudged to be illegal, that the defendants be ordered and directed by an injunction having the force and effect of a writ of mandamus, to deliver to these plaintiffs the two certified checks of \$2,000 each, drawn on the Interstate Trust Company, of Denver, Colorado, in favor of the defendant City of Bozeman; or if the said checks have been cashed and cannot be returned, that the plaintiffs have judgment against the City of Bozeman for the sum of four thousand dollars (\$4,000), together with interest thereon [18] at the rate of eight per cent per annum from the date said checks were cashed.

3. That if said issue of bonds be adjudged by this Court to be legal outstanding obligations of the City of Bozeman, that a writ of injunction having the force and effect of a writ of mandamus may be issued out of this Honorable Court commanding the defendants John A. Luce and C. A. Spieth, as mayor and city clerk, respectively, of said City of Bozeman, to deliver to these plaintiffs the issue of bonds as described in the said bids, upon these plaintiffs depositing in this court the amount of said bids.

4. That upon the filing of this bill of complaint an order be issued directed to the said defendants and each of them, requiring them to show cause at a time and place to be fixed by this Court why a preliminary writ of injunction should not issue against them, enjoining and restraining them from selling and delivered said issue of bonds to other persons, and from negotiating or cashing said certified checks

so deposited with them.

5. That from time to time such other and further orders, general and specific, may be made by your Honor as will effectuate the object and purposes for which this suit is brought, and that the plaintiffs may have such writs, processes and other aids of the court as may from time to time be found necessary to accomplish said object and purposes.

6. And for all such other, further and general relief as to a court of equity may seem meet in the premises. [19]

SWEET, CAUSEY, FOSTER & COMPANY.

JAMES N. WRIGHT & COMPANY.

C. W. McNEAR & COMPANY.

By E. C. DAY,

THOS. A. MAPES,

Their Solicitors.

JAMES H. PERSHING, Esq.,

FREDERICK S. TITSWORTH, Esq.,

JOHN H. FRY, Esq.,

MYLES P. TALLMADGE, Esq.,

Denver, Colorado,

Of Counsel. [20]

United States of America,

District of Montana,

State of Montana,

County of Lewis and Clark,—ss.

E. C. Day, being first duly sworn, on oath deposes and says: That he is one of the solicitors for the plaintiffs above named; that each of said plaintiffs

is a foreign corporation and has no officer or agent within the State of Montana, wherefore he makes this verification for and on behalf of said plaintiffs and as their said solicitor; that he has read the foregoing bill of complaint and knows the contents thereof, and that the matters therein stated are true to the best of his knowledge, information and belief.

E. C. DAY.

Subscribed and sworn to before me this 14th day of July, 1916.

[Seal]

T. A. MAPES,

Notary Public for the State of Montana, Residing at Helena, Mont.

My commission expires July 24, 1917. [21]

**Exhibit "A" to Bill of Complaint—Council
Resolution No. 695.**

EXHIBIT "A."

COUNCIL RESOLUTION No. 695.

A COUNCIL RESOLUTION PROVIDING FOR THE ISSUANCE OF WATER WORKS BONDS, IN THE SUM OF \$235,000; \$100,000 OF THE PROCEEDS THEREOF TO BE USED IN REDEEMING THE PRESENT OUTSTANDING WATER WORKS BONDS AND THE BALANCE IN EXTENDING, IMPROVING AND ENLARGING THE PRESENT WATER WORKS SYSTEM AND ACQUIRING AN AUXILIARY OR ADDITIONAL WATER WORKS SYSTEM FROM BOZEMAN CREEK FOR THE CITY OF BOZEMAN; AND PROVIDING FOR THE CALLING AND HOLDING OF A SPE-

CIAL ELECTION FOR THE PURPOSE OF SUBMITTING THE QUESTION OF SUCH BOND ISSUE TO THE QUALIFIED ELECTORS.

WHEREAS, the present water works system and water supply of the City of Bozeman in the State of Montana, are inadequate and insufficient for the private and public needs of said City; and

WHEREAS, the necessity of extending, improving and enlarging the present water works system and acquiring an auxiliary or additional water works system to provide the present and future needs of said City with municipal water, is imperative; and

WHEREAS, an additional supply of water may be obtained from Bozeman Creek; and whereas, there are \$100,000.00 of outstanding Water Works Bonds.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF BOZEMAN, MONTANA:

Section 1. That the City of Bozeman issue and sell \$235,000.00 of Water Works Bonds, upon the credit of the City, with coupons attached thereto; \$100,000.00 of the proceeds from the sale thereof to be used in redeeming the present outstanding Water Works Bonds and the balance in extending, improving and enlarging the present water works [22] system and acquiring an auxiliary or additional water works system from Bozeman Creek, for the City of Bozeman.

Section 2. That the City Clerk is hereby directed to give notice, as provided by law, that there will be

submitted to the taxpayers, as defined by Sections 468 and 469 of the Revised Codes of Montana of 1907, who are also possessed of the qualifications of electors in the said City of Bozeman, at a special election to be held at the time of the General Spring Election on April 3, 1916, the question of the said City issuing Water Works Bonds upon the credit of the said City in the sum of \$235,000.00, the proceeds from the sale thereof to be used for the purposes aforesaid. At the said election ballots shall be provided in accordance with law and shall contain the words:

“Water Works Bonds”

“Bonds Yes” and

“Bonds No.”

and in voting, the elector shall make a cross thus “X” opposite the answer for which he intends to vote. The election shall be conducted and canvassed, and the returns made in the same manner as other City elections.

Section 3. If a majority of the votes cast at said election shall be cast for “Bonds—Yes,” the City Council shall, as soon as practicable thereafter, give notice by advertisement in the “Weekly Courier,” a weekly newspaper published in the City of Bozeman, and also in some newspaper published in the City of New York, for a period not less than four weeks, to the effect that the City of Bozeman will sell the bonds voted at said election, briefly describing them, at public auction at not less than their par value, and shall state the time when and the place where such sale shall take place. [23]

Section 4. That the Mayor and City Clerk of the City of Bozeman are hereby authorized and instructed to sign and execute, after the sale thereof, the said Water Works Bonds to an amount not to exceed the sum of \$235,000.00. The Bonds issued by virtue of this Resolution shall be known as "Water Works Bonds"; shall be dated July 1, 1916; shall be of the denomination of One Thousand Dollars each and shall bear interest at a rate not exceeding five per cent per annum; interest payable semi-annually on the first days of January and July in each year. Said bonds shall have attached semi-annually coupon notes for each installment of interest, and the bonds and coupons attached thereto shall be signed by the Mayor and City Clerk; provided a lithographic or an engraved facsimile of the signatures of the Mayor and City Clerk may be affixed to the coupons only, and it shall be so recited in the bonds. The said bonds shall be consecutively numbered, beginning at number one.

Section 5. A tax of one mill on the dollar shall be levied each year upon the taxable property in said City and the proceeds thereof, together with the net proceeds derived from the sale of water by said City, shall be used for the purpose of paying the interest on said bonds so issued, and to create a sinking fund for their redemption, until the same are paid in full and redeemed.

The City Treasurer shall pay in lawful money of the United States on the first day of January and the first day of July in each year, the interest due on such bonds upon the presentation at his office of the

proper coupons, which shall show the amount due and the number of bonds to which they severally belong; but in case the holder or holders of such bonds shall give the Treasurer notice, in [24] writing, that he or they wish the bonds so held by them and the interest to be paid in New York City, then such bonds and coupons shall be payable in New York City, (at such bank as shall be designated by the City Treasurer), and all bonds and coupons so paid shall be returned to the City Council at the next monthly meeting and said bonds and coupons shall be cancelled in the manner in which City Warrants are now cancelled.

Section 5. The Water Works Bonds, the issuance of which is herein provided for, shall be payable in twenty years and redeemable at the option of the City of Bozeman at any time after ten years, and whenever at any time after ten years from the date of issuance of said bonds, the sum in the sinking fund shall equal or exceed One Thousand Dollars, the said Treasurer shall cause notice to be published in one newspaper in the City of Bozeman, that he will within thirty days from the date of such notice, redeem said amount of bonds, giving the number thereof, and calling for said bonds in their numerical order. A similar notice shall be given by mail to such bank in the City of New York as the City Treasurer has designated as the bank at which said bonds and interest thereon will be paid; and if at the expiration of thirty days, the holder or holders of said bonds shall fail or neglect to present the same for payment, interest shall cease and the Treas-

urer shall be ready at all times to redeem said bonds on presentation.

Section 7. That the said bonds shall be in such form as the City Council of the City of Bozeman shall hereafter by Ordinance, prescribe.

Passed February 28, 1916.

Approved February 28, 1916.

JOHN A. LUCE,
Mayor.

[Seal]

Attest: C. A. SPIETH,
City Clerk. [25]

**Exhibit "B" to Bill of Complaint—Council
Resolution No. 696.**

EXHIBIT "B."

COUNCIL RESOLUTION No. 696.

A COUNCIL RESOLUTION PROVIDING FOR THE ISSUANCE OF SEWER BONDS IN THE SUM OF \$70,000; THE PROCEEDS FROM THE SALE THEREOF TO BE USED IN EXTENDING, IMPROVING AND ENLARGING THE SANITARY SEWER AND STORM SYSTEMS OF THE CITY OF BOZEMAN; AND PROVIDING FOR THE CALLING AND HOLDING OF A SPECIAL ELECTION FOR THE PURPOSE OF SUBMITTING THE QUESTION OF SUCH BOND ISSUE TO THE QUALIFIED ELECTORS.

WHEREAS, the present sanitary sewer system and storm sewer system of the City of Bozeman in the State of Montana, are inadequate and insufficient for the private and public needs of said City; and

WHEREAS, the necessity of extending, improving and enlarging the present sanitary sewer system and storm sewer system to meet the present and future needs of said City with proper and adequate sanitary sewer and storm sewer facilities, is imperative;

NOW THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF BOZEMAN, MONTANA:

Section 1. That the City of Bozeman issue and sell \$70,000.00 of sewer bonds upon the credit of said City, with coupons attached thereto; the proceeds from the sale thereof to be used in extending, improving and enlarging the present sanitary sewer system and storm sewer system of the City of Bozeman.

Section 2. That the City Clerk is hereby directed to give notice as provided by law, that there will be submitted to the taxpayers, as defined by Sections 468 and 469 of the Revised Codes of Montana of 1907, who are also possessed of the qualifications of electors in the said City of Bozeman, at a special election to be held at the [26] time of the General Spring Election of April 3, 1916, the question of said City issuing sewer bonds upon the credit of the said City in the sum of \$70,000.00, the proceeds from the sale thereof to be used for the purposes aforesaid. At the said election, ballots shall be provided in accordance with law and shall contain the words:

“Sewer Bonds.”

“Bonds Yes” and

“Bonds No.”

and in voting, the elector shall make a cross thus “X” opposite the answer for which he intends to

vote. The election shall be conducted and canvassed, and the returns made in the same manner as other City elections.

Section 3. If a majority of the votes cast at said election shall be cast for "Bonds—Yes," the City Council shall, as soon as practicable thereafter, give notice by advertisement in the "Weekly Courier," a weekly newspaper published in the City of Bozeman, and also in some newspaper published in the City of New York, for a period of not less than four weeks, to the effect that the City of Bozeman will sell the bonds voted at said election, briefly describing them, at public auction at not less than their par value, and shall state the time and the place where such sale shall take place.

Section 4. That the Mayor and City Clerk of the City of Bozeman are hereby authorized and instructed to sign and execute, after the sale thereof, the said Sewer Bonds to an amount not to exceed the sum of \$70,000.00. The bonds issued by virtue of this Resolution shall be known as "Sewer Bonds"; shall be dated July 1, 1916; shall be of the denomination of One Thousand Dollars each and shall bear interest at a rate not exceeding five per cent per annum; [27] interest payable semi-annually on the first days of January and of July in each year. Said bonds shall have attached semi-annual coupon notes for each installment of interest, and the bonds and coupons attached thereto shall be signed by the Mayor and City Clerk; provided a lithographic or engraved facsimile of the signatures of the Mayor and City Clerk may be affixed to the coupons only,

and it shall be so recited in the bonds. The said bonds shall be consecutively numbered, beginning at number one.

Section 5. A tax of one and one-half mills on the dollar shall be levied each year upon the taxable property in said City and the proceeds thereof shall be used for the purpose of paying the interest on said Bonds as issued, and to create a sinking fund for their redemption, until the same are paid in full and redeemed.

The City Treasurer shall pay in lawful money of the United States on the first day of January and the first day of July in each year, the interest due on such bonds upon the presentation at his office of the proper coupons, which shall show the amount due and the number of the bonds to which they severally belong; but in case the holder or holders of such bonds shall give the Treasurer notice, in writing, that he or they wish the bonds so held by them and the interest to be paid in New York City, then such bonds and coupons shall be payable in New York City (at such bank as shall be designated by the City Treasurer), and all bonds and coupons so paid shall be returned to the City Council at the next monthly meeting and said bonds and coupons shall be cancelled in the manner in which City Warrants are now cancelled.

Section 6. The Sewer Bonds, the issuance of which is herein provided for shall be payable in twenty years and [28] redeemable at the option of the City of Bozeman at any time after ten years, and whenever at any time after ten years from the

date of issuance of said bonds, the sum in the sinking fund shall equal or exceed One Thousand Dollars, the said Treasurer shall cause notice to be published in one newspaper in the City of Bozeman, that he will within thirty days from the date of such notice, redeem said amount of bonds, giving the number thereof, and calling for said bonds in their numerical order. A similar notice shall be given by mail to such bank in the City of New York as the City Treasurer has designated as the bank at which said bonds and interest thereon will be paid; and if at the expiration of thirty days the holder or holders of said bonds shall fail or neglect to present the same for payment, interest shall cease and the Treasurer shall be ready at all times to redeem said bonds on presentation.

Section 7. That the said bonds shall be in such form as the City Council of the City of Bozeman shall hereafter by Ordinance, prescribe.

Passed February 28, 1916.

Approved February 28, 1916.

JOHN A. LUCE,

Mayor.

[Seal]

Attest: C. A. SPIETH,

City Clerk. [29]

Exhibit "C" to Bill of Complaint.

EXHIBIT "C."

ORDINANCE No. 456.

AN ORDINANCE DIRECTING THE ISSUANCE OF WATER WORKS BONDS OF THE CITY OF BOZEMAN, MONTANA, to the AMOUNT OF \$235,000.00; \$100,000.00 OF THE

PROCEEDS THEREOF TO BE USED IN REDEEMING THE PRESENT OUTSTANDING WATER WORKS BONDS AND THE BALANCE IN EXTENDING, IMPROVING AND ENLARGING THE PRESENT WATER WORKS SYSTEM AND ACQUIRING AN AUXILIARY OR ADDITIONAL WATER WORKS SYSTEM FROM BOZEMAN CREEK FOR THE CITY OF BOZEMAN; AND PROVIDING FOR A TAX TO BE LEVIED EACH YEAR FOR THE PURPOSE OF PAYING THE INTEREST ON SUCH BONDS AND TO CREATE A SINKING FUND FOR THEIR REDEMPTION.

WHEREAS, the City Council of the City of Bozeman, at a special meeting held on February 28, 1916, duly and regularly passed Council Resolution No. 695 entitled "A Council Resolution Providing for the Issuance of Water Works Bonds, in the sum of \$235,000.00; \$100,000.00 of the Proceeds thereof to be Used in Redeeming the Present Outstanding Water Works Bonds and the Balance in Extending, Improving and Enlarging the Present Water Works System and Acquiring an Auxiliary or Additional Water Works System from Bozeman Creek for the City of Bozeman; and Providing for the Calling and Holding of a Special Election for the Purpose of Submitting the Question of Such Bond Issue to the Qualified Electors," and

WHEREAS, the City Council of said City in said Council Resolution No. 695, ordered that a special election be held in the City of Bozeman, Montana, on the 3d day of April, 1916, and the City Clerk

of said City was authorized and directed to give notice thereof as provided by law for the purpose of submitting to the taxpayers of said City of Bozeman, as defined by Sections 468 and 469 of the Revised [30] Codes of Montana of 1907, who were also possessed of the qualifications of electors in the said City of Bozeman, the question of the said City of Bozeman issuing waterworks bonds upon the credit of the said city in the sum of \$235,000.00, the proceeds from the sale thereof to be used in redeeming the present outstanding waterworks bonds and the balance in extending, improving and enlarging the present water works system and acquiring an auxiliary or additional water works system from Bozeman Creek for the City of Bozeman; and

WHEREAS, at the said special meeting of the said City Council, held on the 28th day of February, 1916, a registry agent was appointed to register the taxpayers of said city, qualified to vote at the said special election to be held on the said 3d day of April, 1916, on the question of the issuance of the said water works bonds, who thereafter gave due notice of registration and duly and regularly registered the names of the taxpayers qualified to vote at said special election, in accordance with the provisions of Ordinance No. 140 of said city, in so far as the same relates to registration for special city elections; and

WHEREAS, a special election was duly noticed and held on the 3d day of April, 1916, in said City of Bozeman, as provided in said Council Resolution No. 695, calling the same, and as provided by law for holding special municipal elections; and

WHEREAS, at an adjourned regular meeting of the City Council of the said city, held on the 7th day of April, 1916, the vote at said special election was duly and regularly canvassed and it was ascertained and determined that at said election 224 votes were cast in favor of the issuance of said water bonds and 132 votes were cast against [31] the issuance of said bonds, and there being a majority in favor of the issuance of said bonds of 92 votes, the question of the issuance of such water works bonds was declared carried; and

WHEREAS, at said meeting of said City Council, held on April 7, 1916, the said City Council appointed May 18, 1916, at seven thirty o'clock P. M., at the Council Chamber in the City Hall Building in the said City of Bozeman, as the time when and the place where the issue of \$235,000.00 of water works bonds of said City would be offered for sale at public auction, and directed the City Clerk to give notice of such sale by advertising in the "Weekly Courier," a weekly newspaper, published in the said City of Bozeman, and in the "Financier," a weekly newspaper published in New York City, for a period of four weeks before May 18, 1916.

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOZEMAN, MONTANA:

Section 1. That the water works bonds of the City of Bozeman, State of Montana, to an amount not to exceed \$235,000.00 be issued upon the sale thereof by the City in pursuance of such sale, for the purpose of redeeming the present outstanding water

works bonds in the sum of \$100,000 and the balance to be used in extending, improving and enlarging the present water works system and acquiring an auxiliary or additional water works system from Bozeman Creek for the City of Bozeman.

Section 2. That the Mayor and City Clerk of the City of Bozeman are hereby authorized and instructed to sign and execute, after the sale thereof, the said Water Works Bonds to an amount not to exceed \$235,000. The bonds issued by virtue of this Ordinance shall be known as [32] "Water Works Bonds"; shall be dated July 1, 1916; shall be of the denomination of One Thousand Dollars each and shall bear interest at a rate not exceeding five per cent per annum; interest payable semi-annually on the first days of January and of July in each year. Said bonds shall have attached semi-annual coupon notes for each installment of interest, and the bonds and coupons attached thereto shall be signed by the Mayor and City Clerk; provided a lithographic or engraved facsimile of the signatures of the Mayor and City Clerk may be affixed to the coupons only, and it shall be so recited in the bonds. The said bonds shall be consecutively numbered, beginning at number one.

Section 3. A tax of one mill on the dollar shall be levied each year upon the taxable property in said City and the proceeds thereof, together with the net proceeds derived from the sale of water by said City, shall be used for the purpose of paying the interest on said bonds so issued, and to create a sinking fund

for their redemption, until the same are paid in full and redeemed.

The City Treasurer shall pay in lawful money of the United States on the first day of January and the first day of July in each year, the interest due on such bonds upon the presentation at his office of the proper coupons, which shall show the amount due and the number of the bonds to which they severally belong; but in case the holder or holders of such bonds shall give the Treasurer notice, in writing, that he or they wish the bonds so held by them and the interest to be paid in New York City, then such bonds and coupons shall be payable in New York City (at such bank as shall be designated by the City Treasurer), and all bonds and coupons so paid shall [33] be returned to the City Council at the next monthly meeting and said bonds and coupons shall be cancelled in the manner in which City Warrants are now cancelled.

Section 4. The Water Works Bonds, the issuance of which is herein provided for, shall be payable in twenty years and redeemable at the option of the City of Bozeman at any time after ten years, and whenever at any time after ten years from the date of issuance of said bonds, the sum in the sinking fund shall equal or exceed one thousand dollars, the said Treasurer shall cause notice to be published in one newspaper in the City of Bozeman that he will within thirty days from the date of such notice, redeem said amount of bonds, giving the number thereof, and calling for the said bonds in their numerical order. A similar notice shall be given by

mail to such bank in the City of New York as the City Treasurer has designated as the bank at which said bonds and interest thereon will be paid; and if, at the expiration of thirty days, the holder or holders of said bonds shall fail or neglect to present the same for payment, interest shall cease and the Treasurer shall be ready at all times to redeem said bonds on presentation.

Section 5. That the said bonds shall be in such form as the City Council of the City of Bozeman shall hereafter by Ordinance prescribe.

Section 6. That this Ordinance shall take effect and be in full force from and after its passage, approval and publication.

Passed this 7th day of April, 1916.

Approved this 7th day of April, 1916.

JOHN A. LUCE,

Mayor.

[Seal]

Attest: C. A. SPIETH,

City Clerk. [34]

Exhibit "D" to Bill of Complaint.

EXHIBIT "D."

ORDINANCE No. 457.

AN ORDINANCE DIRECTING THE ISSUANCE OF SEWER BONDS OF THE CITY OF BOZEMAN, MONTANA, TO THE AMOUNT OF \$70,000; THE PROCEEDS FROM THE SALE THEREOF TO BE USED IN EXTENDING, IMPROVING AND ENLARGING THE SANITARY AND STORM SEWER SYSTEMS OF THE CITY OF BOZEMAN; AND PROVIDING FOR A TAX TO BE LEVIED EACH YEAR FOR THE PUR-

POSE OF PAYING THE INTEREST ON SUCH BONDS AND TO CREATE A SINKING FUND FOR THEIR REDEMPTION.

WHEREAS, the City Council of the City of Bozeman, at a special meeting held on February 28, 1916, duly and regularly passed Council Resolution No. 696 entitled "A Council Resolution Providing for the Issuance of Sewer Bonds in the Sum of \$70,000; the Proceeds from the Sale Thereof to be Used in Extending, Improving and Enlarging the Sanitary Sewer and Storm Sewer Systems of the City of Bozeman; and Providing for the calling and holding of a Special Election for the Purpose of Submitting the Question of such Bond Issue to the Qualified Electors"; and

WHEREAS, the City Council of said City in said Council Resolution No. 696, ordered that a special election be held in the City of Bozeman, Montana, on the 3d day of April, 1916, and the City Clerk of said City was authorized and directed to give notice thereof as provided by law for the purpose of submitting to the taxpayers of said City of Bozeman, as defined by Sections 468 and 469 of the Revised Codes of Montana of 1907, who were also possessed of the qualifications of electors in the said City of Bozeman, the question of the said City of Bozeman issuing sewer bonds upon the credit of the said City in the sum of \$70,000, the proceeds from the sale thereof to be used [35] in extending, improving and enlarging the present sanitary sewer systems and storm sewer system of the City of Bozeman; and

WHEREAS, at the said special meeting of the

said City Council, held on the 28th day of February, 1916, a registry agent was appointed to register the taxpayers of said City, qualified to vote at the said special election to be held on the 3d day of April, 1916, on the question of the issuance of the said Sewer Bonds, who thereafter gave due notice of the registration and duly and regularly registered the names of the taxpayers qualified to vote at said special election, in accordance with the provisions of Ordinance No. 140 of said City, in so far as the same relates to registration for Special City Election; and

WHEREAS, a special election was duly noticed and held on the 3d day of April, 1916, in said City of Bozeman, as provided in said Council Resolution No. 696 calling the same, and as provided by law for holding special municipal elections; and

WHEREAS, at an adjourned regular meeting of the City Council of said City, held on the 7th day of April, 1916, the vote at said special election was duly and regularly canvassed and it was ascertained and determined that at said election, 239 votes were cast in favor of the issuance of said sewer bonds and 116 votes were cast against the issuance of said sewer bonds, and there being a majority in favor of the issuance of said bonds of 123 votes, the question of the issuance of such sewer bonds was declared carried; and

WHEREAS, at said meeting of said City Council held on April 7, 1916, the said City Council appointed May 18, 1916, at seven thirty o'clock P. M., at the Council [36] Chamber in the City Hall Building in the said City of Bozeman, as the time when and

the place where the issue of \$70,000 of sewer bonds would be offered for sale at public auction, and directed the City Clerk to give notice of such sale by advertising in the "Weekly Courier," a weekly newspaper published in the said City of Bozeman, and in the "Financier," a weekly newspaper published in New York City, for a period of four weeks before May 18, 1916.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOZEMAN, MONTANA:

Section 1. That the sewer bonds of the City of Bozeman, State of Montana, to an amount not to exceed \$70,000, be issued upon the sale thereof by the City in pursuance of such sale, for the purpose of extending, improving and enlarging the present sanitary sewer system and storm sewer system of the City of Bozeman.

Section 2. That the Mayor and City Clerk of the City of Bozeman are hereby authorized and instructed and sign and execute, after the sale thereof, the said Sewer Bonds to an amount not to exceed the sum of \$70,000. The bonds issued by virtue of this Ordinance shall be known as "Sewer Bonds"; shall be dated July 1, 1916; shall be of the denomination of One Thousand Dollars each and shall bear interest at a rate not exceeding five per cent per annum; interest payable semi-annually on the first days of January and of July in each year. Said bonds shall have attached semi-annual coupon notes for each installment of interest, and the bonds and coupons attached thereto shall be signed by the Mayor and City

Clerk; provided a lithographic or engraved facsimile of the signatures of the Mayor and City Clerk may be affixed to the coupons only, and it shall be so recited in the bonds. The said bonds [37] shall be consecutively numbered, beginning at number one.

Section 3. A tax of one and one-half mills on the dollar shall be levied each year upon the taxable property in said City and the proceeds thereof shall be used for the purpose of paying the interest on said bonds as issued, and to create a sinking fund for their redemption, until the same are paid in full and redeemed.

The City Treasurer shall pay in lawful money of the United States on the first day of January and the first day of July in each year, the interest due on such bonds upon the presentation at his office of the proper coupons, which shall show the amount due and the number of the bonds to which they severally belong; but in case the holder or holders of such bonds shall give the Treasurer, notice, in writing, that he or they with the bonds so held by them and the interest to be paid in New York City, then such bonds and coupons shall be payable in New York City, (at such bank as shall be designated by the City Treasurer), and all bonds and coupons so paid shall be returned to the City Council at the next monthly meeting and said bonds and coupons shall be cancelled in the manner in which City Warrants are now cancelled.

Section 4. The Sewer Bonds, the issuance of which is herein provided for shall be payable in twenty years and redeemable at the option of the

City of Bozeman at any time after ten years, and whenever at any time after ten years from the date of issuance of said bonds, the sum in the sinking fund shall equal or exceed One Thousand Dollars, the said treasurer shall cause notice to be published in one newspaper in the City of Bozeman, that he will within thirty days from the date of such notice, redeem said amount of bonds, giving the number thereof, [38] and calling for said bonds in their numerical order. A similar notice shall be given by mail to such bank in the City of New York as the City Treasurer has designated as the bank at which said bonds and interest thereon will be paid; and if at the expiration of thirty days, the holder or holders of said bonds shall fail or neglect to present the same for payment, interest shall cease and the Treasurer shall be ready at all times to redeem said bonds on presentation.

Section 5. That the said bonds shall be in such form as the City Council of the City of Bozeman shall hereafter by Ordinance prescribe.

Section 6. That this Ordinance shall take effect and be in force from and after its passage, approval and publication.

Passed this 7th day of April, 1916.

Approved this 7th day of April, 1916.

JOHN A. LUCE,
Mayor.

[Seal]

Attest: C. A. SPIETH,
City Clerk. [39]

Exhibit "E" to Bill of Complaint.**EXHIBIT "E."****FINANCIAL STATEMENT.**

Issued by the City of Bozeman, Gallatin County, Montana, at close of business, March 31, 1916.

Date of sale to be determined. Manner of sale—advertised auction.

Total amount of this issue, \$70,000.00 Check required, to be determined later.

Purpose of issue, extending, improving and enlarging present sanitary sewer system and storm sewer system of the City of Bozeman.

Bonds are a direct obligation of entire municipality.

Date of bonds, July 1, 1916. Due July, 1936.

Optional, July 1, 1926.

Rate not over 5%. Denomination, \$1000. Interest semi-annual.

Interest payable January 1st and July 1st.

Principal and interest payable at office of City Treasurer and such New York bank as he may designate.

To be voted April 3, 1916.

ITEMIZED STATEMENT OF BONDS PREVIOUSLY ISSUED AND NOW OUTSTANDING.

Bonds issued for Water, 5%, due Jan.

1919	\$100,000.00
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Bonds issued for City Hall Funding, 4%,

due Jan. 1921.....	21,000.00
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Bonds issued for Warrant Funding, 5%, due Jan. 1934, optional July, 1924.	155,000.00
Bonds issued for All Imp. Districts Floating	975.00

Total indebtedness including this issue,
but not \$135,000.00 additional Water
Bonds to be voted on April 3, 1916.\$644,361.13

[40]

Cash value of sinking funds on hand applicable to the redemption of the above bonds	\$ 6,172.38
Improvement District Funds.....	2,311.84
All Other Funds.....	11,771.69
Total.....	\$20,255.91

True value of real estate and personal property (estimated)\$10,000,000.00
Assessed value of real estate and personal property, equalized 1915
(331 $\frac{1}{3}$ %) 3,209,196.00
Population, Census, 1890, 2143; Census, 1900, 3419;
Census 1910, 5107; Present estimated, 7500.

City incorporated, 1883.

No previous issues of bonds have been contested.

Principal and interest of all bonds previously issued have always been promptly paid at maturity.

There is no controversy or litigation pending or threatened affecting the corporate existence or the boundaries of the said municipality or the title of its present officials to their respective offices, or the validity of its bonds.

Issue authorized by special Election.

The proceeds of these bonds will not be used directly or indirectly for any other purpose than that above stated.

Dated at Bozeman, Montana, this 1st day of April, 1916.

C. A. SPIETH,
City Clerk.

[Endorsed]: Title of Court and Cause. Bill of Complaint. Filed July 14, 1916. Geo. W. Sproule, Clerk. [41]

Thereafter, on July 20, 1916, Answer was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

Answer to Plaintiffs' Bill of Complaint.

Come now the above-named defendants, and not waiving any objections to the Bill of Complaint or to the sufficiency thereof, to state a cause of action against the defendants, or either of them and insisting on the insufficiency thereof, and for their joint and several answer to the Bill of Complaint of plaintiff, admit, deny and allege as follows, to wit:

1. They admit the allegations of paragraph 1 and 2 of said Bill of Complaint.

2. They admit that this is a suit in equity; and admit that the matter in controversy exceeds the sum of Three Thousand Dollars (\$3,000).

3. Admit the allegations of paragraphs 4, 5, 6, 7, 8, 9, and 10 of said Bill of Complaint.

4. They admit that in pursuance of said notice,

dated April 12, 1916, as the same appears on pages 6 and 7 of said Bill of Complaint, the plaintiffs applied to and received from the City Clerk of the said City of Bozeman, a financial statement, dated, April 1, 1916, a copy of which is attached to said Bill of Complaint, marked Exhibit "E"; and they further allege that in addition to said financial statement, the plaintiffs demanded and received, at least two weeks before the 18th day of May, 1916, a true, full and correct transcript of all of the proceedings pertaining to each of said bond issues and financial statements attached to each thereof, similar to said Exhibit "E," [42] and that on the 18th day of May, 1916, and prior to the time of the bidding by them for said bonds, the plaintiffs were fully advised of all of the proceedings of the said City Council of the City of Bozeman, regarding said bond issues and as to the financial condition of the said city and as to the legality of all of the proceedings regarding said bond issues; and that the said plaintiffs made the bid for the said bonds and entered into the agreement of the 18th day of May, 1916, with full knowledge and information regarding all of the proceedings had and done with regard to the submission of said question of the issuance of said bonds to the vote of the duly qualified electors and taxpayers of the City of Bozeman. And the defendants further allege that the plaintiffs made said bid with due notice from the defendants that no bid was desired from any person or corporation, if they had any doubt of the validity of the said bonds, which notice was given by the defendant, John A. Luce, as the

Mayor of said city, at the said meeting of the said City Council on the 18th day of May, 1916. In addition to the notice mentioned and set forth in paragraph 12 of said Bill of Complaint, the allegations of which, the defendants admit, the defendants aver that for the reasons aforesaid, the plaintiffs are in equity and good conscience, estopped from now claiming that said bonds are, or ever were illegal, for the reasons stated in said Bill of Complaint or for any other reason whatever.

5. They admit that on the 26th day of May, 1916, the said City of Bozeman, acting through its Mayor, the defendant, John A. Luce, submitted to the plaintiffs, certified transcripts of all proceedings relating to the issuance of said bonds, and that plaintiffs received the same at the City [43] of Denver, on or about the 27th day of May, A. D. 1916, and that they submitted the question of the legality of the said issues of bonds to said Pershing, Titsworth and Fry, and admit that an opinion was rendered by said attorneys that the issue of said bonds was illegal as claimed, for two reasons. First. That they created an indebtedness in excess of the constitutional limit of indebtedness as prescribed by the Constitution of the State of Montana. Second. Because the question of the refunding bonds and the new bonds for the purpose of creating an additional water supply was a double question and had been submitted as one question to the taxpayers affected thereby and said attorneys claim that said taxpayers had not been afforded an opportunity to vote upon the question of the issuing of new water bonds as a separate

proposition; but these defendants deny that the issuance of said bonds would in any way exceed the constitutional limit of indebtedness of the said City of Bozeman, but aver that they are less than the amount authorized by the Constitution and Laws of the State of Montana, and they deny that there was any double question submitted to the said taxpayers of the said City of Bozeman on either of the said bond issues and deny that the said bonds are now or ever have been illegal, and the defendants aver that the legal and outstanding indebtedness of the said City of Bozeman, for general purposes under the three per cent limitation of the Constitution and Laws of the State of Montana, did not at the time of the sale of said bonds, and does not now exceed \$96,279.88, to wit: That the said legal, outstanding indebtedness for general purposes did not exceed three per cent of the assessed valuation of the City of Bozeman, all of which plaintiffs well knew at the time said contract was entered into. The defendants [44] further allege that the total indebtedness of the said City of Bozeman, for water and sewer purposes, including the proposed bond issues, does not and will not after such issuance exceed ten per cent of the assessed valuation of the taxable property in the said City of Bozeman, as it appears upon the last assessment-roll of the County of Gallatin, State of Montana.

6. The defendants admit that on the 9th day of June, 1916, the plaintiffs through the plaintiffs, Sweet, Causey, Foster and Company, notified the defendant, John A. Luce as Mayor of the City of Bozeman, that their attorneys had rendered an opinion

declining to approve the legality of said bonds, by telegram reading in the words and figures as follows, to wit:

“Denver, Colo., June 8, 1916, 1:51 P. M.

John A. Luce, Mayor,

Bozeman, Mt.

Attorney's opinion declining to approve legality of Bozeman Bonds. Our Mr. Phillips will be in Bozeman, Saturday, with copy of opinion to talk situation over with you.

SWEET, CAUSEY, FOSTER & COMPANY.”

And these defendants allege that the plaintiffs had, prior to said time, repudiated said Contract and prior to the receipt of said transcript from the defendant, John A. Luce, had telegraphed to the defendant, C. A. Spieth, a night letter as follows, to wit:

“Just received from Torrence contract which he purported to sign on behalf of our associates and ourselves for purchase of your bonds. He had no authority to bid except strictly subject to the approval of our attorneys as to the legality of the bonds proposed to be issued. This is the only way in which we bid for bonds. We are willing to let the bid stand as ours subject to the approving opinion of our attorneys as to the legality of the issues which opinion shall be conclusive, but we absolutely cannot assume the further responsibility of otherwise establishing illegality if our attorneys should decline to approve legality of bond issues. If you are willing to accept this condition let us know, and forward certified transcripts for examination, otherwise

please return to us our certified checks.” [45]

7. These defendants admit that on the 20th day of June, 1916, and at divers other times, the plaintiffs have demanded of the defendants, the return of the said certified checks; but they deny that they have ever demanded compliance with the provisions of said contract, or ever tendered any blank bonds for signing or that the plaintiffs, or either of them at any time, offered to take said bonds and pay for the same or to otherwise comply with the said contract upon their part; but they admit that on or about the 21st day of June, 1916, the said plaintiffs, through said Sweet, Causey, Foster and Company, served a notice upon the defendants, in the words and figures following, to wit:

“June 21, 1916.

The Mayor and City Council of Bozeman,
c/o C. A. Spieth, City Clerk,
Bozeman, Montana.

Gentlemen:

Heretofore you have been notified that Mr. L. E. Torrence did not have any authority to make a contract on behalf of this company, and its associates, such as was purported to be entered into by him on the 18th day of May, 1916.

You have also been notified that the \$235,000.00 bond issues offered for sale by you at public auction were in fact illegal, and the return to us of the amount of our certified checks in the sum of \$4,000.00 has been demanded. Without waiving any of our rights under the action we have taken, we desire to call

your attention to the fact that the said purported contract contains this language:

‘The party of the first part agrees to promptly take such steps to make these issues legal as may be required and deemed necessary by the attorneys of the parties of the second part, * * * to promptly furnish them with evidence of the legality of the issue in form satisfactory to their attorneys.’

Enclosed you will find a letter from our attorneys stating what will be necessary in order to make these bond issues legal. Kindly notify us at once whether or not you are willing to comply with their demands, and oblige

Yours very truly,

SWEET, CAUSEY, FOSTER & COMPANY,

By C. L. PHILLIPS.” [46]

That said opinion of Pershing, Titsworth and Fry, being the attorneys mentioned in said letter of June 21, 1916, was as follows, to wit:

“June 20, 1916.

Sweet, Causey, Foster & Company,

Equitable Bldg.,

Denver, Colorado.

Gentlemen:

In re proposed \$305,000 Bond Issues by the City of Bozeman, Montana.

In reply to your verbal inquiry as to whether or not under any circumstances the City of Bozeman, Montana, could legally issue bonds at this time to the extent above mentioned, we wish to say.

As we understand the proposition, the City of Boze-

man intends to make three issues of bonds. The first issue being for \$100,000.00, denominated 'REFUNDING CITY BONDS,' the second for \$70,000.00, denominated 'SEWER BONDS,' and the third for \$135,000.00, denominated 'WATER WORKS BONDS.'

As a first objection to the issuance of the total amount of bonds above set forth, it appears from the records submitted by the City Clerk of the City of Bozeman, that the assessed valuation of the said City as equalized in 1915 was \$3,209,196. Upon the issuance of these bonds the total outstanding indebtedness of the City, exclusive of the indebtedness for improvement districts, would amount to \$475,030.93, after excluding the amount of improvement district funds on hand and deducting the cash value of sinking funds, and all other funds except improvement district funds. The City cannot under any circumstances incur indebtedness in excess of thirteen (13) per cent of its assessed valuation. The issuance of these bonds, then, would cause the City to become indebted, after deduction of cash on hand, in the sum of \$57,835.45 over and above the thirteen per cent limit. Therefore, the total amount of these bonds cannot be issued until the City has reduced its indebtedness so that the total amount of its indebtedness at the time of the issuance of these bonds will not exceed the constitutional and statutory limitations. Unless that can be done promptly, there is no way in which the total amount of these bonds can be legally issued. If by any means the indebtedness can be reduced, then the following things will have

to be done before legal bonds could be issued. In naming these things we will take up each issue separately.

With reference to the Refunding Bonds.

The City Council has authority to issue these refunding bonds without an election, but before they do so it is necessary that two conditions exist. These conditions are set out in Section 3464 of the Revised Code of Montana of 1907, Volume 1. They are as follows: [47]

‘1. When there is not sufficient money to the credit of said City or town applicable to pay any of said bonds.

2. When in the judgment of the City or town Council to levy and collect a tax for the paying of any of said bonds would be a hardship and a burden to said City or town.’

Nothing in the proceedings submitted indicate that these conditions exist. Therefore, either the ordinances authorizing the issuance of these bonds or some preliminary resolution or ordinance should be adopted finding and declaring that such conditions do exist. If the conditions do exist and Council so finds them, the outstanding \$100,000.00 in water bonds could be refunded by an Ordinance, the ordinance containing the proper recitals, and making a provision for the issuance of the bonds, their sale and the fixing of a tax to be levied each year for the payment of the interest thereon and the creating of a sinking fund for the payment of the principal thereof. The tax so fixed, however, should be sufficient for the purpose. After such ordinance was

passed, the bonds should be advertised for sale, offered to the State Land Board, etc., in accordance with the statutes.

Second, with reference to the Water Works Bonds.

It would be necessary to call a new election at which the question of the issuing of such bonds, and such bonds alone, should be voted upon. This election to be called either by resolution or ordinance. After the election is held in the manner provided by the statute, if a sufficient number of voters vote in favor of the issuance of the bonds, then an ordinance authorizing their issuance should be passed, which ordinance should contain the form of the bond, provide for their sale, and also fix a tax to be levied each year sufficient to pay the interest and principal thereof, which ordinance should also pledge for the payment of these bonds the net revenues of the water works system, as provided in the constitution and statutes of Montana. The bonds should be offered to the State Land Board, and advertised for sale in the manner prescribed by the City Council.

Third, with reference to the Sewer Bonds.

These bonds might be legally issued as they stand if the other bonds are not issued by amending the ordinance providing for the issuance so as to make a sufficient levy for the payment of the interest and creating a sinking fund to pay the principal, together with proof that they have been offered to the state land board and the county attorney's opinion rendered as to their validity.

We have not gone into all the details of procedure with reference to this matter, but enough to point

out the essential things that will have to be done. If it is desired that we prepare proper proceedings, we can do so, but it would be useless to do so until the present indebtedness of the town is decreased so that the total indebtedness including the bonds proposed to be issued would come within the constitutional and statutory debt limits of Montana.

Yours very truly,

PERSHING, TITSWORTH and FRY.” [48]

And the defendants aver that the said letter and opinion of said Pershing, Titsworth and Fry constitute the only demand ever made upon any of the defendants looking towards the curing of any pretended illegality of said bonds; and the defendants aver that the same was not made in good faith, but was a demand that the City pay off \$57,835.45 of indebtedness, which the defendant, the City of Bozeman, could not do and the plaintiff should have known could not have been done and the said demand contemplated an entire new proceeding for the issuance of the bonds and was in no way or manner, a demand for correcting any illegality of the proceedings for the issuance of the bonds in question.

8. The defendants admit that through the officers of the City of Bozeman, they have attempted to collect the money upon said certified checks; but that the plaintiffs, wrongfully and unlawfully stopped payment upon the same, and the said checks have not been paid. They deny that the defendant, the City of Bozeman, or the defendants, Luce or Spieth, or any officers of said City have ever refused to issue to the plaintiffs the bonds purchased by plaintiff; but

they aver that the plaintiffs have never at any time in any way or manner complied with any of the terms of said contract upon their part to be kept and performed.

9. The defendants admit that plaintiffs have been advised by their attorneys that said proposed issues of bonds are illegal, but they deny that the same or any of them are illegal, for the reasons as set forth in said Bill of Complaint, or at all.

10. They admit that plaintiffs are engaged in the business of dealing in municipal securities such as those involved herein and in buying and selling such securities in the open market in the various parts of the United States, [49] to persons desiring to invest in such securities; but they deny that the question of legality of the said bonds depends upon the opinion of any attorney, or that the opinion of any attorney can in any manner affect the validity of the same.

11. They admit that the value of such securities fluctuates from time to time, and they admit that damage may arise to purchasers of securities by reason of the fluctuation in prices, if delivery is not had within a reasonable time and by reason of the variation in the market. But they deny that such damage cannot readily and easily be ascertained or measured by money values; and they aver that the plaintiffs have a plain, speedy and adequate remedy at law for all of the wrongs complained of in said Bill of Complaint.

12. They deny that said bonds have been withheld from plaintiff except only for the wrongful and un-

lawful attempt of the plaintiffs to repudiate said contract and to pretend to claim that said bonds are illegal; and aver that if the plaintiffs have suffered any loss or damage whatever, which the defendants deny, by reason of not receiving the said bonds, the same was caused by the plaintiffs themselves, and not by any act of the defendants.

13. Admit that the plaintiffs bid for the water and sewer bonds as one issue; but deny that the plaintiffs are or ever have been willing to accept said bonds and the defendants aver that at no time have the plaintiffs ever prior to the bringing of this suit offered to take said bonds, but that they have continually, as herein set forth, attempted to repudiate said contract and obtain the return of said checks.

14. They deny that the defendants were under any obligations to institute proceedings to determine the validity or legality of said bonds; but they aver that the defendant, John A. Luce, as Mayor of said City, offered to bring an action to [50] test the validity of said bonds if the plaintiffs would accept the decision of the Court as final and accept and pay for said bonds; and that the plaintiffs refused the said offer, which was made prior to the 21st day of June, 1916; and the defendants further admit that after the repeated demands and notices of the plaintiffs, repudiating said contract, claiming the illegality of said bonds and demanding the return of said checks and after the notice of June 21, 1916, demanding conditions impossible of fulfillment by the said City of Bozeman, the said City of Bozeman has sold said bonds to the Harris Trust and Savings Bank

of Chicago, Illinois, and said bonds have been printed, and will be signed and delivered and accepted by said Harris Trust and Savings Bank, as legal upon the proceedings claimed to be illegal by the plaintiffs herein.

15. And the defendants deny each and every allegation in said Bill of Complaint not herein specifically admitted or denied.

And the defendants further answering said Bill of Complaint, aver:

1. That the said bill does not state a cause that entitles them or either of them to the relief or any of the relief as therein sought and prayed for from and against these defendants or either of them.

2. That the said bill is deficient in certainty and is uncertain in this, to wit:

That it cannot be ascertained from the allegations of said bill, whether the plaintiffs insist and rely upon the illegality and invalidity of the bonds mentioned and described in said bill and in the contract between the plaintiffs and defendants, [51] City of Bozeman, copied on pages six and seven of said bill, or whether the plaintiffs claim that said bonds are valid; that it cannot be ascertained from the allegations of said bill whether the plaintiffs are seeking to recover of the defendants and particularly of the City of Bozeman, said two certified checks, because of the illegality of the said bonds, or whether the plaintiffs are attempting to enforce specific performance of the said contract between the City of Bozeman and the plaintiffs, because of the legality of the said bonds, or whether the plaintiffs are attempting to

enjoin the defendants from the sale and delivery of illegal bonds to others than the plaintiffs, or whether the plaintiffs are attempting to enjoin the defendants from negotiating said checks because of the illegality of said bonds; it cannot be ascertained therefrom whether the plaintiffs are seeking to specifically enforce said contract and to compel the defendants to deliver to them the bonds mentioned therein, or whether they are attempting to cancel said contract and to recover said checks, or the amount thereof, deposited with the City Clerk at the time of entering into the contract to purchase the said bonds.

3. That the plaintiffs did not in their bill, offer to do equity; but on the contrary are taking inconsistent and irreconcilable positions with regard to the said bonds mentioned in the contract between plaintiffs and the defendant, the City of Bozeman.

4. That the said bill is exhibited against these defendants for several and distinct and independent matters and causes, which have no relation to each other and in which, [52] and the greater part of which the defendants, Luce and Spieth are in no way interested and concerned and ought not to be implicated.

5. That two independent and distinct causes of action are joined in the said bill, which are wholly inconsistent in this: That the plaintiffs claim that the said bonds are illegal and seek to recover the said checks, or the amounts thereof from the defendants, and are also seeking to enjoin the defendants from disposing of said bonds, so claimed to be illegal and

for a decree of specific performance of said contract. One of the said causes of action being an action at law and the other an action in equity.

And the defendants further answering allege:

1. That the City of Bozeman is a municipal corporation as alleged in said Bill of Complaint and admitted in this answer.

2. That the water supply of said City is deficient and that there is great danger unless the said deficiency shall be speedily supplied to the citizens of Bozeman; that great and irreparable damage and injury will be caused to the property and the residents and taxpayers of the said City and the Agricultural College of the University of the State of Montana, situated in said City of Bozeman, by reason of fire and also by reason of the lack of water supply during the season of irrigation for the lawns and for domestic purposes upon the higher grounds of said City.

3. That the sewage system of said City is inadequate and it is necessary for the speedy extension of the sewers to provide for proper disposal of the sewage of said City.

4. That the said \$100,000 of outstanding water bonds bear interest payable semi-annually and that it became and [53] was necessary in order to refund said bonds to call the same on the 1st day of July, A. D. 1916, when the interest became due, otherwise the City of Bozeman would lose six months' interest upon said bonds, which could only be redeemed on the 1st of July or the 1st of January in any year.

5. That the season in which work upon the water

and sewer systems proposed to be extended and improved in the City of Bozeman, and for which said bond issues were made, is extremely short, and that the plaintiffs, at the time of said telegram regarding the illegality of said contract, was notified by the defendant, the City of Bozeman, through its Mayor, the defendant, John A. Luce, on the 25th day of May, 1916, by telegram and by letter of the facts aforesaid, which letter containing a copy of said telegram was as follows:

“May 25, 1916.

Sweet, Causey, Foster & Co.,
Denver, Colorado.

Dear Sirs:

Yesterday I arrived home from Billings where I was attending a meeting of the Executive Committee of the Municipal League of Montana Cities. Mr. Spieth, the City Clerk, presented your telegram to me last night and I do not quite understand your position. Have just wired you as follows:

‘Your telegram regarding bonds purchased at hand. Feel assured every proceeding legal. Time is short. Bidders had transcript of proceeding so as to determine validity and notice was given at sale that invalidity, if claimed, must be shown by purchaser. Council considered your bid best and no provision of contract will be waived. Am sending by express complete transcripts except final adoption of ordinances which will be adopted June first in forms as they appear in transcripts. Minutes of May 18th and 22nd are correct, merely lack final approval on

June first. Feel sure a good attorney will find no illegality. Am writing. Yours very truly,
City of Bozeman, by John A. Luce, Mayor.'

The proceedings in the matter of the bond issue have all been carefully prepared and scrutinized by Mr. Harry D. Kremer, city attorney, and myself.

I have practiced law thirty years in Montana and we were careful to make these elections and bond issues in [54] every respect according to law. It was the purpose of the City in furnishing transcripts of proceedings prior to sale so that the question you injected into the matter could not exist. In other words, we expected prospective bidders to satisfy themselves of the proceedings before the bids were made. One bond company who bid within \$10 of the price bid by your representative showed to our City Attorney the opinion of Woods & Oakley, eminent bond attorneys of Chicago, as to the validity of the proceedings up to that time. With these facts before me I notified all prospective bidders before the sale that two weeks would be allowed for examination of the proceedings, and if invalidity was claimed, the invalidity must be established by the purchaser. All bidders bid with this distinct understanding, and the contract was drawn and signed by Mr. L. E. Torrence for you and your associates.

The City does not expect any one to take illegal bonds, but on the contrary, the City will not allow this bond issue to be held up by the mere whimsical opinion of any attorney, especially as the bids were made with the distinct understanding as above set forth.

I am sure if the bonds had been sold to the Harris Trust and Savings Bank, no contention such as you make would have arisen, and there was only \$5.00 difference on the bids on each issue.

The Council, relying upon your bid, which we deemed bona fide, and upon your contract as signed, has ordered the City Treasurer to call the one hundred thousand dollars worth of outstanding water works bonds which are to be paid off out of the \$235,000 of water works bonds sold. The call is for July 1, 1916.

It is also vitally necessary that work on the sewer and water works should not be delayed. The Council has already received bids for a large portion of this work. The season here is short and delay in the final consummation of this purchase by you will damage the City immensely under these circumstances. The City must positively decline to return any checks to you or to modify the contract in any way. I presume that you and your associates really desire the bonds and feel that you are raising a question now, which will not arise after you have examined the proceedings.

We are sending to you full transcripts of all proceedings except only the final passage of the ordinances prescribing forms of the bonds. These ordinances have been introduced in the Council, read and referred to the Judiciary Committee and will be passed and approved June 1, 1916, in the form as set forth in the transcripts and on that date will receive my signature and the signature of Mr. Carl A. Spieth, City Clerk.

In fact, the forms of these Ordinances were upon the table when the bonds were sold and bidders were asked to go forward and inspect the same. Mr. L. E. Torrence was furnished with complete copies of the proposed ordinances immediately after the sale on May 18th and he was requested to forward the same to you. The officers of the City know nothing about any custom of your company, or any reservations that you may have intended to make, but the announcement of what the City expected was made to all bidders and clearly understood when your bid was accepted. [55]

Officers of the City had knowledge that Mr. Torrence has represented you in many bond sales in Montana for some time past. Furthermore, the certified checks filed by him were made to you and by your cashier endorsed to Mr. Torrence personally.

It is apparent that you could not possibly question Mr. Torrence's agency in this particular matter.

However, I am sure that when the transcripts are examined any question that you may now have will be dispelled and that the bonds will be taken by you under the contract.

After your attorneys have examined and passed upon the transcripts, you will probably desire that the signatures be inserted approving the ordinances, and also that the approval of the Minutes of May 18th and May 22nd shall be inserted, and also a transcript of the Minutes of June 1, 1916, regarding the passage of these ordinances.

These will be made and affixed to the transcript and returned to you, as soon after the transcripts

are received as they can be prepared and attached.

If your attorneys claim any illegality in the proceedings, kindly return the transcripts to Mr. Carl A. Spieth, City Clerk, at once, pointing out any claims of invalidity.

Yours very truly,

JOHN A. LUCE, Mayor."

6. That after the sending of said letter, the said transcripts of the proceedings regarding the said bond issues, were sent to said Sweet, Causey, Foster and Company as averred in said Bill of Complaint, and that said plaintiffs served the following notice in writing upon the defendant, the City of Bozeman, and the defendant, John A. Luce, Mayor, rejecting the said bonds, said rejection being in the following words and figures, to wit:

"June 10, 1916.

The City of Bozeman,

Honorable John A. Luce, Mayor,

Bozeman, Montana.

Dear Sir:

The agreement of May 18th, 1916, which Mr. L. E. Torrence purported to make on behalf of our associates and ourselves covering the \$305,000 municipal bonds of the City of Bozeman, offered for sale on that day, contains the provision that at the end of two weeks time from the receipt of the transcripts pertaining to said bond proceedings we shall announce our acceptance or rejection thereof as to the legality of said proceedings. [56]

The said certified transcripts which you sent us by express were received by us on Saturday, May

27th, 1916, and in accordance with suggestion contained in your letter to us dated May 25th were submitted to our attorneys. We telegraphed you on June 8th briefly that our attorneys had declined to approve the legality of said proceedings, and this morning handed you their opinion thereon bearing date June 7th, 1916. Upon this opinion, we are forced to announce our rejection.

Yours very truly,

SWEET, CAUSEY, FOSTER & CO.

By C. N. PHILLIPS."

7. That since the 10th day of June, 1916, the said plaintiffs have never attempted in any way or manner until the bringing of this suit to establish the illegality of said bonds or to furnish the defendants with blank bonds as provided in said contract, mentioned and set forth in Plaintiffs' Bill of Complaint, or to comply with the same and that after the receipt of the said letter of June 21, 1916, with the opinion of Pershing, Titsworth and Fry, dated June 20, 1916, herein set forth defendants being convinced that the plaintiffs did not intend to take said bonds, proceeded to and did sell the said bonds to Harris Trust and Savings Bank, which bank has agreed to accept said bonds as legal.

8. That it is absolutely necessary in order to carry out the said plans of the City of Bozeman and to provide adequate sewage system and adequate water supply for the City of Bozeman, that it shall receive promptly the proceeds from the sale of said bonds; and that any further delay and the issuance of an injunction herein would cause the said defendant,

the City of Bozeman, great and irreparable damage and injury and have the effect of preventing the completion of said work for a long time. [57]

9. That relying upon the contract between the plaintiffs and defendant, the City of Bozeman, the City of Bozeman proceeded to call said \$100,000 of water works bonds to be paid on the 1st day of July, 1916, that the dilatory tactics of the plaintiffs in endeavoring to get out of said contract in the purchase of said bonds and the taking of the said bonds and the taking of the three inconsistent and irreconcilable positions regarding said contract and said bonds, and their demand of the City to commence anew and readvertise and take new proceedings entirely delayed the said City of Bozeman and it would have prevented entirely the carrying out of the said water works and sewage projects, had the said City of Bozeman not sold said bonds to the Harris Trust and Savings Bank.

10. That relying upon the sale of said bonds to the Harris Trust and Savings Bank, the said City of Bozeman has procured the Commercial National Bank of Bozeman, Montana, to take up and pay off said \$100,000 of outstanding water bonds on the 1st day of July, 1916, to be reimbursed out of the proceeds of the sale of said \$305,000 bonds involved in this suit to the said Harris Trust and Savings Bank.

11. That relying upon the contract between plaintiffs and defendant, the City of Bozeman, the City of Bozeman advertised for bids for the construction of storm and sanitary sewers and bids had been received and contracts awarded, and the contractors

are awaiting for the final consummation of the said sale to said Harris Trust & Savings Bank, before commencing the work, which said contract has been let.

12. That the plaintiffs, through said Sweet, Causey, Foster Company, at a meeting of the City Council of said [58] City of Bozeman, held on the 10th day of June, 1916, upon request of the defendant, John A. Luce, as Mayor of said city, to state to said Council whether they would take said bonds or not, declined to state whether they would so take them or not and their representative, said Philips, whose name is signed to the said notices herein set forth, declined to state whether they claim said contract to be legal or illegal and refused to take any position regarding the same, except only to demand the return of the certified checks of \$4,000.

13. That because of the delay caused by the unreasonable unwarranted and unlawful conduct of the plaintiffs, the defendant, the City of Bozeman, has already been greatly damaged in a sum largely in excess of \$4,000; and that if the injunction is issued, as prayed for herein, the City of Bozeman could not receive this money upon said bonds from the plaintiffs after the final hearing of this case and the said bonds were printed, signed and delivered in time to complete said work during the season of 1916, at the great and irreparable injury and damage of the defendant, the City of Bozeman, and its residents, that the injury to the defendants, the City of Bozeman, and to the residents thereof, by reason of the issuance of the injunction or the decree of the specific

performance herein will be great and irreparable and will be a damage and injury to the health and comfort of the people of the said defendant, the City of Bozeman and might involve it in litigation with Harris Trust and Savings Bank, and in case of fire in certain portions of the city might result in a loss of thousands of dollars worth of property. That the injury to the plaintiffs, if any, can be measured entirely in dollars and cents; if said bonds are in fact legal, the plaintiffs could in the proper action, recover the said certified checks, or the value thereof in an action at law. [59]

14. That the plaintiffs are not entitled to receive said bonds from the defendant, the City of Bozeman, because they have repeatedly refused to take same as hereinbefore set forth and have notified the defendants of the rejection of said bonds and have demanded as a condition precedent to the taking of the same, an entirely new advertisement for said bonds, the payment of over \$58,000 of indebtedness in the excess of the legal limits of the indebtedness of the said City of Bozeman and the readvertisement of said bonds for sale and to hold another election at great cost and expense to the City of Bozeman, which proceedings, if had, as demanded would not be proceedings, to validate the proposed issues of bonds, but the creation of a new issue of bonds, and that it would to take such proceedings, prevent for many months, the consummation of the purposes desired by the issuance of said bonds, whereas, if the defendants are allowed to sell said bonds and deliver the same to the said Harris Trust and Savings Bank,

said work can progress and the contractors are willing to immediately commence the work for which said bonds are to be issued.

WHEREFORE, the defendants having fully answered, pray that the said injunction be not granted; that the decree of specific performance of said contract be not made; that said bill be dismissed; that if the same shall not be dismissed that this Court find that the plaintiffs are not entitled to the return of said checks and that the defendant, the City of Bozeman, is entitled to the same under the terms of said contract; that the defendants recover of and from the plaintiffs, the costs and disbursements in this cause and for such other and further relief as may be meet in the premises, the defendants will ever pray. [60]

CITY OF BOZEMAN,

A Corporation.

JOHN A. LUCE,

Mayor of City of Bozeman,

And C. A. SPIETH,

City Clerk of the City of Bozeman.

By JOHN A. LUCE,

HARRY D. KREMER,

Their Solicitors.

(Duly verified.)

(Filed July 20, 1916. Geo. W. Sproule, Clerk.
[61])

Thereafter, on February 13, 1917, the Decision and Opinion of the Court was duly filed herein, in the words and figures following, to wit: [62]

(Title of Court and Cause.)

Memorandum Decision.

Herein the Court finds for plaintiffs and against defendants; and therefrom the Court concludes plaintiffs are entitled to an injunction as prayed.

Feb. 13, 1917.

BOURQUIN, J.

MEMO.

Plaintiffs having deposited certified checks upon a bid for defendants' sewer and water bonds, later asserted the bonds would be illegal if issued, and demanded return of the checks. Defendants refused return, insisting the bonds would be legal.

Between the parties was a written agreement of that largely implied by law, that if the bonds were legal plaintiffs would pay in full or forfeit the checks as liquidated damages, and if illegal, defendants would return the checks. This suit is to enjoin transfer or collection of the checks and to compel their return. Only legal questions are involved, and but one, determinative of the case, will be noticed.

Section 3259, subd. 64, Rev. Codes Montana, provides that cities may become indebted and issue bonds for sewers and water, amongst other things; provided, that the total indebtedness must not exceed 3% of the city's assessed property valuation; provided, no money must be borrowed on bonds for sewers or water until the proposition has been submitted to and approved by the taxpayers; "and further provided that an additional indebtedness shall be incurred when necessary" for sewers or water, but this

additional indebtedness "shall not exceed 10% over and above the 3%" referred to; "and provided further, that the above limit of 3% shall not be extended, unless the question shall have been submitted to" and [63] carried in the affirmative by the votes of the taxpayers.

At all material times herein defendants' debts exceeded the 3% limit. The council's resolutions to submit to the electors the question of these bonds, the notices of election, and the subsequent ordinances for the issue of the bonds, described them as sewer and water bonds, but did not state or advise that they would extend or be in excess of the 3% limit. Accordingly it is believed that the question of incurring bonded debts extending or exceeding the 3% limit was not submitted to and voted upon by the electors. Consequently, the council not having strictly pursued the statute, had no authority to issue these bonds, and if issued they would be illegal.

Although the statute does not define how the question shall be brought home to electors, it is intended to subserve a useful purpose and contemplates and intelligent vote by an electorate having knowledge that it is to determine not only that a bonded debt shall or shall not be incurred, but also that it is a proposed bonded debt extending or exceeding the 3% limit. The question that the statute directs shall be submitted is not, shall the city incur a bonded debt, but is, shall the city incur a bonded debt extending or exceeding the 3% limit. To vote for the first is not to vote for the last. Electors would vote for the first, encumbering their property not more than 3%, who

would not vote for the last, encumbering it more than 3%. And notice to vote upon the question of proposed bonded debts, is not notice to vote upon the question of proposed bonded debts extending or exceeding the 3% limit.

The notices of election were fatally defective. And this, in reason, whether the proposed debt will be the first extension of the 3% limit, or only an addition to an existing extension. All of this is of the general law of elections. [64] The point has not been passed upon by the state Supreme Court, though the statute is involved in *Lepley v. Fort Benton*, 51 Mont. 551; *Arnold v. Miles City*, 46 Mont. 478; *Carlson v. Helena*, 39 Mont. 104, and cases in them cited.

It is not material that plaintiffs' refusal to take the bonds was based on other and in part, at least, untenable grounds of illegality. Their bid was for legal bonds. Defendants knew the facts of illegality, and for which was no remedy but new proceedings and involving new bids.

It will be noted this decision deals with the situation as it was when plaintiffs refused the bonds, and not with what it might be by reason of presumptions, recitals and estoppels after and if the bonds were issued.

Plaintiffs' refusal was justified and they were entitled to return of the checks. Certified, the latter are not overdue, and plaintiffs are entitled to protection against *bona fide* indorsees, are entitled to the relief prayed for, and it is so decreed.

BOURQUIN, J.

Filed Feb. 13, 1917. Geo. W. Sproule, Clerk.

Thereafter, on February 17, 1917, Decree was duly filed and entered herein, in the words and figures following, to wit:

(Title of Court and Cause.)

Decree.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, to wit:

That the defendants be and they are hereby ordered and directed to deliver to the Clerk of this court on or before the 24th day of February, 1917, those two certified checks drawn by Sweet, Causey, Foster & Company on the Interstate Trust Company of Denver, Colorado, payable to the order of L. E. Torrence and indorsed by him and delivered to the defendant C. A. Spieth, City Clerk of the City of Bozeman, on the 18th day of May, 1916, pursuant to the terms of the contract for the purchase of the bonds described in the bill of complaint that plaintiffs entered into with the City of Bozeman by the said L. E. Torrence as agent of the plaintiffs, being the checks described in the bill of complaint.

It is further ordered that the plaintiffs do have and recover from the defendants herein their costs taxed at the sum of One Hundred Eighty-four 80/100 Dollars (\$184.80).

Dated February 17, 1917.

GEORGE M. BOURQUIN,
Judge.

Filed and entered Feb. 17, 1917. Geo. W. Sproule,
Clerk. [66]

Thereafter, on Feb. 26, 1917, Petition for Appeal was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

Petition for Appeal.

To the Honorable GEORGE M. BOURQUIN, District Judge:

The above-named defendants, feeling aggrieved by the decree rendered and entered in the above-entitled cause on the ^{17th} ~~14th~~ day of February, A. D. 1917, do hereby appeal from the said decree to the Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the assignment of errors filed herewith, and they pray that their appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such court in such cases made and provided.

And your petitioners further pray that the proper order relating to the required security to be required of them be made.

H. D. KREMER,
GEORGE Y. PATTEN,
Attorneys for Appellants.

Filed Feb. 26, 1917. Geo. W. Sproule, Clerk.
[67]

Thereafter, on Feb. 26, 1917, Assignment of Errors was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

Assignment of Errors.

Come now the defendants in the above-entitled cause, and file the following assignment of errors upon which they will rely upon their prosecution of the appeal in the above-entitled cause from the decree made by this Honorable Court on the 14th day of February, 1917.

I.

That the District Court for the District of Montana erred in holding that the question of the City of Bozeman incurring bonded debts extending or exceeding the three per cent limit (under the provisions of Sec. 6, Art. XIII, of the Constitution of Montana, and Sec. 3259, subdiv. 64, of the Rev. Codes of 1907) was not submitted to and voted upon by the electors of said city, for the reasons: [68]

(1) Under the laws of Montana the question to be submitted, and which was submitted, was whether the bonds should be issued, and in voting in favor of issuing the bonds, the electors thereby voted to extend the three per cent limit.

(2) The statutes of Montana define how the question of extending or exceeding the three per cent limit of indebtedness of cities for water and sewer purposes shall be submitted to the electors, the form of submission being prescribed in Sec. 3454 et seq., Rev. Codes of Mont. of 1907.

(3) The questions to be voted upon by the electors, as stated in the Council's resolutions to submit to such electors the question of said bonds, the notices of election, the ballots and the subsequent ordinances for the issue of the bonds, conformed to and complied with the provisions of said statutes.

II.

That said District Court erred in holding that the issue of the bonds in question herein, to wit, the water works bonds of said city aggregating \$235,000, and the sewer bonds of said city aggregating \$70,000, would be or were illegal, for the same reasons.

III.

That the said District Court erred in finding for the plaintiffs and against the defendants, for the same reasons.

IV.

That the said District Court erred in making and entering its decree herein on February 14, 1917, in favor of the plaintiffs and against the defendants, for the same reasons. [69]

WHEREFORE, the appellants pray that said decree may be reversed, and that said District Court for the District of Montana be ordered to enter a decree reversing the decision of the lower court in said cause.

H. D. KREMER,
GEORGE Y. PATTEN,
Attorneys for Appellants.

Filed Feb. 26, 1917. Geo. W. Sproule, Clerk.
[70]

Thereafter, on Feb. 26, 1917, Order Allowing Appeal was duly entered herein, in the words and figures following, to wit:

(Title of Court and Cause.)

Order Allowing Appeal and Fixing Amount of Bond.

On motion of H. D. Kremer, Esquire, and George Y. Patten, Esquire, attorneys for defendants, it is hereby ordered that an appeal to the Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, allowed, and that a certified transcript of the record testimony, exhibits, stipulations and all proceedings, be transmitted to said Circuit Court of Appeals for the Ninth Circuit. It is further ordered that the bond on appeal be fixed at the sum of \$300, the same to act as a supersedeas bond, and also as a bond for costs and damages on appeal.

Dated February 26th, 1917.

GEORGE M. BOURQUIN,
Judge.

Filed and entered Feb. 26, 1917. Geo. W. Sproule,
Clerk. [71]

Thereafter on March 5, 1917, Bond on Appeal was duly approved and filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS,
that we, City of Bozeman, a municipal corporation,

by L. W. Truitt, Mayor of the City of Bozeman, and C. A. Spieth, City Clerk of the City of Bozeman, as principal, and J. H. Baker and Amos C. Hall, as sureties, of the county of Gallatin, State of Montana, are held and firmly bound unto Sweet, Causey, Foster & Company, a corporation, James N. Wright & Company, a corporation, and C. W. McNear & Company, a corporation, in the sum of three hundred dollars, lawful money of the United States, to be paid to them and their respective executors, administrators and successors; to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and each of our heirs, [72] executors, administrators and successors, by these presents.

Sealed with our seals, and dated this 28th day of February, 1917.

WHEREAS, the above-named City of Bozeman, L. W. Truitt, as Mayor thereof, and C. A. Spieth, as City Clerk thereof, have prosecuted an appeal to the Circuit Court of Appeals for the Ninth Circuit to reverse the decree of the District Court for the District of Montana in the above-entitled cause.

NOW, THEREFORE, the condition of this obligation is such that if the above-named City of Bozeman, a municipal corporation, L. W. Truitt, as Mayor thereof, and C. A. Spieth, as City Clerk thereof, shall prosecute their said appeal to effect, and answer all costs if they fail to make good their

plea, then this obligation to be void; otherwise to remain in full force and effect.

CITY OF BOZEMAN,

[Seal]

By L. W. TRUITT,

Mayor.

C. A. SPIETH,

City Clerk.

J. H. BAKER.

AMOS C. HALL. [73]

State of Montana,

County of Gallatin,—ss.

On the — day of February, 1917, personally appeared before me L. W. Truitt and C. A. Spieth, known to me to be the Mayor and City Clerk, respectively, of the City of Bozeman, a municipal corporation, and the persons described in and duly executed the foregoing instrument as officers of said corporation, and respectively acknowledged to me that the said corporation executed the same for the uses and purposes therein set forth.

Also personally appeared before me J. H. Baker and Amos C. Hall, respectively known to me to be the persons described in and duly executed the foregoing instrument as parties thereto, and respectively acknowledged, each for himself, that they executed the same as their free act and deed, for the purposes therein set forth.

And the said J. H. Baker and Amos C. Hall, being respectively by me sworn, says, each for himself and not one for the other, that he is a resident and householder of the said county of Gallatin, State of Montana, and that he is worth the sum of \$300 over and

above his just debts and legal liability and property exempt from execution.

L. W. TRUITT.

C. A. SPIETH.

J. H. BAKER.

AMOS C. HALL.

Subscribed and sworn to before me this 28th day of February, 1917.

[Notarial Seal] GEORGE Y. PATTEN,
Notary Public for the State of Montana, Residing at
Bozeman, Montana.

My Commission expires January 3, 1920. [74]

The within bond is approved both as to sufficiency and form this 5th day of March, 1917.

GEORGE M. BOURQUIN,
Judge.

Filed March 5, 1917. Geo. W. Sproule, Clerk.
[75]

Thereafter, on March 14, 1917, the Statement of the Evidence herein was duly approved and filed, being in the words and figures following, to wit:

(Title of Court and Cause.)

Statement of the Evidence.

BE IT REMEMBERED that on the 10th day of January, 1917, at a stated term of the said court begun and holden in Helena, in the District of Montana, before his Honor, George M. Bourquin, District Judge, the issue joined in the above-stated cause between the said parties came on to be heard before the said Judge without the intervention of a jury,

the plaintiffs being represented by Messrs. Day & Mapes, their attorneys, and the defendants by Harry D. Kremer, Esquire, and George Y. Patten, Esquire; and upon the trial of that issue the attorneys for the plaintiffs, to maintain and prove the said issue on their part, offered the following evidence, to wit:

Testimony of C. N. Phillips, for Plaintiff.

C. N. PHILLIPS, called as a witness on behalf of the plaintiffs, [76] having been duly sworn, testified as follows:

Direct Examination.

The WITNESS.—I reside in Denver; am treasurer of the plaintiff Sweet, Causey, Foster & Company, and have charge of the municipal department of that business, which is that of buying municipal and other bonds. They have their office in Denver. I am familiar with the proceedings surrounding the transactions in suit as far as they were conducted by said plaintiff. I have in my possession correspondence of that company so far as it relates to these transactions.

Whereupon Plaintiffs' Exhibit "A," being a copy of the agreement set out at length in the bill of complaint (see page), was identified by the witness and admitted in evidence. Plaintiffs' Exhibit "B," being a copy of a telegram dated May 22, 1916, from Sweet, Causey, Foster & Company to C. A. Spieth, City Clerk, Bozeman, Montana, set out at length in paragraph 6 of the answer (see page), was identified by the witness and admitted in evidence.

Whereupon Plaintiffs' Exhibit "C" was identified by the witness as a telegram dated May 26, 1916, re-

ceived by Sweet, Causey, Foster & Company, signed by the City of Bozeman, by John A. Luce, Mayor, and was admitted in evidence, and read as follows:

**Plaintiff's Exhibit "C"—Telegram, May 26, 1916,
City of Bozeman to Sweet, Causey, Foster
& Co.**

"Your telegram regarding Bonds purchased at hand feel assured every proceeding legal time is short bidders had transcript of proceeding so as to determine validity and notice was given at sale that invalidity if claimed must be shown by purchaser council considered your bid best and no provision of contract will be waived am sending by express complete transcripts except final adoption of ordinances which will be adopted june first in forms as they appear in transcript minutes of may eighteenth and twenty second are correct merely lack final approval on june first feel sure a good attorney will find no illegality am writing." [77]

Whereupon Plaintiffs' Exhibit "D," being a letter written by Sweet, Causey, Foster & Company to the defendant John A. Luce, Mayor of the City of Bozeman, dated May 27, 1916, was identified by the witness and admitted in evidence, and read as follows:

**Plaintiff's Exhibit "D"—Letter, May 27, 1916,
Sweet, Causey, Foster & Co. to John A. Luce,
Mayor of the City of Bozeman.**

"This will acknowledge receipt of your night letter received yesterday morning reading as follows:

'Your telegram regarding bonds purchased at hand. Feel assured every proceeding legal. Time

is short. Bidders had transcript of proceeding so as to determine validity and notice was given at sale that invalidity if claimed must be shown by purchaser. Council considered your bid best and no provision of contract will be waived. Am sending by express complete transcripts except final adoption of ordinances which will be adopted June first in forms as they appear in transcript minutes of May 18th and 22d, are correct, merely lack final approval on June 1st. Feel sure a good attorney will find no illegality. Am writing,'—the same being in reply to our night letter of a few days ago sent your City Clerk, which read as follows: 'Just received from Torrence contract which he purported to sign on behalf of our associates and ourselves for purchase of bonds. He had no authority to bid except strictly subject to the approval of our attorneys as to legality of the bonds proposed to be issued. This is the only way in which we bid for bonds. We are willing to let the bid stand as ours subject to the approving opinion of our attorneys as to the legality of the issues which opinion shall be conclusive, but we absolutely cannot assume the further responsibility of otherwise establishing illegality if our attorneys should decline to approve legality of bond issues. If you are willing to accept this condition let us know, and forward certified transcripts for examination, otherwise please return to us our certified checks.'

We are at a loss to interpret the meaning of the clause which you inserted in the contract which Mr. Torrence signed as to establishing illegality if claimed. When we purchase bonds we always sub-

mit the legal transcript to a firm of recognized bond attorneys, and depend upon their opinion as to the legality of the issue, and that is what we expected to do with your bonds when we sent Mr. Torrence there to bid on them; in fact, that is what we would still like to do, but we cannot recede from the position taken in our former telegram.

We note from your wire that a certified transcript has been forwarded by express, and that you are [78] writing us, and hope that your letter will enlighten us as to your views. If we are still in doubt after receipt of your letter as to what shall determine the legality or illegality of your bonds to your satisfaction, it is likely that the writer will go to Bozeman to talk the matter over with you, as we are confident that by talking together we could quickly reach a mutually satisfactory understanding."

The WITNESS.—Plaintiffs' Exhibit "E," now shown me, is a letter received by us signed by John A. Luce, Mayor of Bozeman, written subsequently to his telegram marked Exhibit "C," and confirming that telegram. It was received subsequently to the writing of the letter Plaintiffs' Exhibit "D," but apparently written and dated prior.

Plaintiff's Exhibit "E"—Letter, May 25, 1916, John E. Luce, etc., to Sweet, Causey, Foster & Co.

Plaintiffs' Exhibit "E," being a letter written by the defendant John A. Luce to the plaintiff Sweet, Causey, Foster & Company, dated May 25, 1916, was admitted in evidence and read as follows:

"Yesterday I arrived home from Billings where I was attending a meeting of the Executive Com-

mittee of the Municipal League of Montana Cities. Mr. Spieth, the City Clerk, presented your telegram to me last night and I do not quite understand your position. Have just wired you as follows:

‘Your telegram regarding bonds purchased at hand. Feel assured every proceeding legal. Time is short. Bidders had transcript of proceeding so as to determine validity and notice was given at sale that invalidity, if claimed, must be shown by purchaser. Council considered your bid best and no provision of contract will be waived. Am sending by express complete transcripts except final adoption of ordinances which will be adopted June first in forms as they appear in transcripts. Minutes of May eighteenth and twenty-second are correct, merely lack final approval on June first. Feel sure a good attorney will find no illegality. Am writing.’

The proceedings in the matter of the bond issue have all been carefully prepared and scrutinized by Mr. Harry D. Kremer, City Attorney, and myself.

I have practiced law thirty years in Montana and we were careful to make these elections and bond issues in every respect according to law. It was the purpose of the City in furnishing transcripts of proceeding prior to sale so that the question you injected into the matter could not exist. In other words, we expected [79] prospective bidders to satisfy themselves of the proceedings before the bids were made. One bond company who bid within \$10 of the price bid by your representative showed to our City attorney the opinion of Woods & Oakley, eminent bond attorneys of Chicago, as to the validity of the

proceedings up to that time. With these facts before me I notified all prospective bidders before the sale that two weeks would be allowed for examination of the proceedings, and if invalidity was claimed the invalidity must be established by the purchaser. All bidders bid with this distinct understanding, and the contract was drawn and signed by Mr. L. E. Torrence for you and your associates.

The City does not expect any one to take illegal bonds, but on the contrary the City will not allow this bond issue to be held up by the mere whimsical opinion of any attorney, especially as the bids were made with the distinct understanding as above set forth.

I am sure if the bonds had been sold to the Harris Trust & Savings Bank no contention such as you make would have arisen, and there was only \$5 difference on the bids on each issue.

The Council, relying upon your bid, which we deemed *bona fide*, and upon your contract as signed, has ordered the City Treasurer to call the One Hundred Thousand Dollars worth of outstanding waterworks bonds which are to be paid off out of the \$235,000 of waterworks bonds sold. The call is for July 1, 1916.

It is also vitally necessary that work on the sewer and waterworks should not be delayed. The council has already received bids for a large portion of this work. The season here is short, and delay in the final consummation of this purchase by you will damage the City immensely under these circumstances. The City must positively decline to return

any checks to you or to modify the contract in any way. I presume that you and your associates really desire the bonds and feel that you are raising a question now which will not arise after you have examined the proceedings.

We are sending to you full transcripts of all proceedings, except only the final passage of the ordinances prescribing forms of the bonds. These ordinances have been introduced in the Council, read, and referred to the judiciary committee, and will be passed and approved June 1, 1916, in the form as set forth in the transcripts and on that date will receive my signature and the signature of Mr. Carl A. Spieth, City Clerk.

In fact, the forms of these ordinances were upon the table when the bonds were sold and bidders were asked to go forward and inspect the same. Mr. L. E. Torrence was furnished with complete copies of the proposed ordinances immediately after the sale on May 18th, and he was requested to forward the same to you. The officers of the City knew nothing about any custom of your company, or any reservations that you may have intended to make, but the announcement of what the City expected was made to all bidders and clearly understood when your bid was accepted. [80]

Officers of the City had knowledge that Mr. Torrence had represented you in many bond sales in Montana for sometime past. Furthermore, the certified checks filed by him were made to you and by your cashier endorsed to Mr. Torrence, personally.

It is apparent that you could not possibly question

(Testimony of C. N. Phillips.)

Mr. Torrence's agency in this particular matter.

However, I am sure that when the transcripts are examined any question that you may now have will be dispelled and that the bonds will be taken by you under the contract.

After your attorneys have examined and passed upon the transcripts, you will probably desire that the signatures be inserted approving the ordinances, and also that the approval of the Minutes of May 18th and May 22nd shall be inserted, and also a transcript of the Minutes of June 1, 1916, regarding the passage of these ordinances.

These will be made and affixed to the transcript and returned to you, as soon after the transcripts are received as they can be prepared and attached.

If your attorneys claim any illegality in the proceedings, kindly return the transcripts to Mr. Carl A. Spieth, City Clerk, at once, pointing out any claims of invalidity."

The WITNESS.—Upon receipt of the transcripts from Bozeman they were immediately submitted to Messrs. Pershing, Titsworth & Fry, a firm of attorneys in Denver of excellent standing, specialists in the examination of municipal bonds. They were the bond experts of Denver houses, and examined probably seventy-five to ninety per cent. Their opinions as to the validity of bonds were accepted in the Denver markets. This transcript, prior to the commencement of this suit, was also submitted to Mr. Charles B. Wood, of Wood & Oakley, in Chicago.

Q. And what is the standing of Messrs. Wood & Oakley?

(Testimony of C. N. Phillips.)

Mr. PATTEN.—That is objected to as immaterial.

The COURT.—I am inclined to think so. Be brief.

The WITNESS.—Mr. Wood, I understand, is the best known bond attorney in the United States, and the man whose opinion is accepted most widely. Wood & Oakley, to whom I submitted the transcript, are the identical persons referred to in Mr. [81] Luce's letter, Plaintiffs' Exhibit "E." Plaintiffs' Exhibit "F" is the opinion of Messrs. Pershing, Tittsworth & Fry on these bonds. I was in Bozeman during the negotiations, and subsequent to the public sale of the bonds. I think I delivered a letter to the officers of the City of Bozeman, of which this is practically a copy. I think there was a slight change in the wording of the letter the attorneys desired to make. They are substantially the same. This letter was delivered to us under date of May 29, 1916.

Mr. DAY.—We now offer in evidence Plaintiffs' Exhibit "F."

Mr. PATTEN.—We object to that as immaterial, and that it does not sustain any of the allegations in the complaint. The bonds having been disposed of, and the court having previously declined to enjoin defendants from selling them, that part of the case is eliminated. Further, the question as to the validity of the bonds is one which presents itself to this court, and is not one which would be for the opinion of attorneys. The opinion of attorneys could only guide plaintiffs as to their conduct at the

(Testimony of C. N. Phillips.)

time, and the ultimate question, and the question to be decided now, is whether the bonds were, in fact, valid or invalid.

Mr. DAY.—Upon that proposition I might state frankly my position in regard to the matter. The City, in offering bonds for sale, implied that the bonds are legal and marketable. No contract entered into by the Mayor or any other officer of the City and a third person can compel the third person to accept the bonds, or authorize the City to forfeit any deposit made upon that purchase. These objections by the attorneys as to the validity of this issue goes to the marketability of the bonds, and your Honor will not, sitting as a Court of Equity, [82] forfeit this penalty when the defendant City has put it beyond the power of the Court to enforce the validity of the bonds, but your Honor will hold that they are legal. In other words, the City cannot just grab off \$4,000, without attempting to deliver marketable bonds.

The COURT.—I do not think that the opinion of the attorney would cut any figure in the case. If that were the case, there never could be a sale of bonds except when the attorneys agreed.

Mr. DAY.—The point is that the contract with the City—if it is valid and binding—provided a method by which the legality might be determined, and the City made no effort when these objections were made to it to remedy the objections. Now certainly the City cannot forfeit this penalty or this deposit without attempting on its part to comply with reasonable

(Testimony of C. N. Phillips.)

objections made; and upon that phase of the case it seems to me that this is admissible as evidence.

Mr. PATTEN.—In view of the statement of Mr. Day, this testimony is shown to be immaterial by the fact that the contract of the defendants was to furnish valid, legal bonds, and were not to furnish bonds which would be marketable at Denver or in any other bond market.

The COURT.—I will receive this under the usual ruling of the Court. The objection is overruled *pro forma*. Exception may be noted for counsel for the defendants. Certainly the Court is not receiving this opinion to control or bind it as to the legality of these bonds.

Whereupon Plaintiffs' Exhibit "F," being a letter written by Pershing, Titsworth & Fry to the plaintiff Sweet, Causey, Foster & Company, dated May 29, 1916, was read as follows: [83]

**Plaintiffs' Exhibit "F"—Letter, May 29, 1916,
Pershing, Titsworth and Fry to Sweet, Causey,
Foster & Co.**

"We have examined the certified records submitted in the above matters and we regret to advise you that we cannot approve the same. The reasons for our disapproval are as follows:

1. The first question submitted to the electors under Resolution No. 695 and the notice of election was: 'The question of the said city issuing waterworks bonds upon the credit of the city in the sum of \$235,000, the proceeds from the sale thereof to be used as follows: One hundred thousand dollars

for redeeming the present outstanding waterworks bonds, and the balance in extending, improving and enlarging the present waterworks system, and acquiring an auxiliary or additional waterworks system from Bozeman Creek, for the city of Bozeman.'

You will observe that this question submits two questions, to wit: (1) the question of authorizing bonds to refund the outstanding water bonds, and (2) the question of authorizing bonds for additional water works. These two questions were submitted as one proposition and the electors were compelled to vote for or against both questions, without an opportunity to vote for one and against the other.

The authorities on this question are almost unanimous in holding that it is improper and illegal to submit two separate and distinct questions in one proposition. We refer you to the case of *Stern v. Fargo*, 26 L. R. A. (N. S.) 665, and the decisions cited in the main case and also in the footnote to said case.

It may be argued that the statutes of Montana do not require the question of issuing refunding bonds to be submitted to a vote of the electors and that therefore the reference to such bonds in these proceedings can be disregarded as surplusage. We cannot agree with such a conclusion. While the statutes do not require the refunding question to be submitted, there is no way of telling how many voters were induced to vote for the water bonds in order to approve the refunding bonds.

2. The statutes of Montana provide that the three per cent. debt limit 'shall not be extended unless the

question shall have been submitted to a vote of the taxpayers affected thereby.' The financial statement contained in the record shows that it was necessary to extend the three per cent. limit, and in our opinion the question of the extension of such limit should have been submitted to the electors of the city.

3. The record shows that if the proposed bonds are issued the city will have a general outstanding indebtedness amounting to \$492,975. The city also has outstanding improvement district indebtedness of \$286,386.00, but the record does not show whether the city is liable for any such debt. The assessed valuation of 1915 is given at \$3,209,196.00. Under the Montana constitution and statutes, a city is limited in the debt which it can incur for all purposes to 13% of its assessed valuation. [84] Thirteen per cent. of the 1915 valuation would limit this city to a debt of \$417,195.00. Therefore, the city is attempting to exceed the debt limit in the amount of \$75,780.00, not considering the improvement district debt.

In connection with this opinion, we refer you to the recent Montana decisions, to wit: *Lepley v. City of Ft. Benton*, 154 Pac. 710; *Arnold v. Miles City*, 128 Pac. 915; *Butler v. Andrus*, 90 Pac. 785, and the other Montana cases cited therein.

4. Section 3459, Revised Codes of Montana, provides: 'A tax to be fixed by ordinance must be levied each year for the purpose of paying interest on the bonds and to create a sinking fund for their redemption.'

(Testimony of C. N. Phillips.)

In the waterworks proceedings a tax levy has been provided of one mill on each dollar of assessed valuation for the payment of interest and for the purpose of creating a sinking fund. This levy is not sufficient even to pay the interest on the proposed waterworks and refunding bonds. It is provided that the net proceeds from the sale of water shall also be placed in these funds, but such provisions are ineffective.

The sewer proceedings provide a levy of one and one-half mills on each dollar of assessed valuation which would be sufficient to pay the interest on the proposed sewer bonds, but would not be sufficient to provide a proper sinking fund.

We return the records herewith."

The WITNESS.—Plaintiffs' Exhibit "G" is the opinion of Charles B. Wood, of the firm of Wood & Oakley, of Chicago, heretofore mentioned by me.

Mr. DAY.—We now offer Plaintiffs' Exhibit "G," purporting to be a letter from Mr. Wood, of the firm of Wood & Oakley, attorneys, relative to the defects appearing upon the record of this issue of bonds.

Mr. PATTON.—We object to the offer of Plaintiffs' Exhibit "G" upon the ground that it is wholly immaterial; that the only purpose it could serve would be to sustain the allegations in the bill of complaint seeking to enjoin the defendant city from disposing of the bonds, and the Court having refused an injunction, and the city of Bozeman having disposed of the bonds that question is not now before

(Testimony of C. N. Phillips.)

the Court. Furthermore, the question [85] as to the validity of the bonds is one for the Court, and not one for attorneys. It is not alleged in the bill that Messrs. Wood & Oakley, or Mr. Wood, were counsel for the plaintiffs, or that plaintiffs acted upon their opinion. These gentlemen, Mr. Wood, or Wood & Oakley, do not seem to have been attorneys even for the plaintiffs.

Which objection was overruled, and an exception noted by defendants.

Whereupon Plaintiffs' Exhibit "G," being a letter from Charles B. Wood, of Wood & Oakley, lawyers, of Chicago, to the plaintiff Messrs. C. W. McNear & Company, of Chicago, Illinois, dated June 7, 1916, was read as follows:

Plaintiff's Exhibit "G"—Letter, June 7, 1916, Wood to G. W. McNear & Co.

"I will approve \$100,000 Water Refunding Bonds and \$70,000 Sewer Bonds of the City of Bozeman, Montana, dated July 1, 1916, provided:

1. It is shown that the bonds were offered to the State Land Board.

2. It is shown that the County Attorney approved the issuance of the bonds in an opinion duly given.

3. As to the Refunding Bonds, it will be necessary for you to see to it that the old bonds are cancelled when the new issue is put forth.

I decline to approve \$135,000 Water Extension Bonds of the City of Bozeman, Montana, dated July 1, 1916, for the following reasons:

(Testimony of C. N. Phillips.)

1. It appears that at the election called to vote upon these bonds two matters were submitted upon a single ballot, to wit: the issue of \$100,000 Refunding Bonds and \$135,000 Water Extension Bonds, and this of course did not afford a voter the opportunity to vote separately upon the questions. The refunding Bonds were not necessary to be submitted at all, and they are approved as above stated, on merely the passage of the ordinance.

2. The issue of these Water Extension Bonds would make the city indebted in excess of the thirteen per cent limit, being the limit imposed by the laws of Montana. My suggestion is that new proceedings be had to authorize these bonds for a reduced amount that will bring them within the thirteen per cent limit."

Whereupon Plaintiffs' Exhibit "H," consisting of the letter from the plaintiff Sweet, Causey, Foster & Company, to the Mayor and City Council of the City of Bozeman, dated June [86] 21, 1916, with the letter dated June 20, 1916, to the plaintiff Sweet, Causey, Foster & Company for Pershing, Titsworth & Fry, both of which are set out at length in paragraph 7 of the answer (see pages — and —) were admitted in evidence.

The WITNESS.—The City of Bozeman did not at any time subsequent to the standing of that letter from Sweet, Causey, Foster & Company to the Mayor and City Council of Bozeman, Plaintiffs' Exhibit "A," comply with the demands therein contained,

(Testimony of C. N. Phillips.)

or do anything else in respect to the legality of this issue of bonds.

Cross-examination.

The WITNESS.—The two sheets of paper defendants' Exhibit No. 1, were handed to me personally in the defendant John A. Luce's office in Bozeman, on June 10, 1916, and Mr. Luce at that time requested me to forward these to my house, Sweet, Causey, Foster & Company, and I did so. Defendants' Exhibit No. 2 was written after Messrs. Sweet, Causey, Foster & Company had had submitted to them Defendants' Exhibit No. 1.

Whereupon Defendants' Exhibit No. 1 was admitted in evidence, and read as follows:

Defendants' Exhibit No. 1.

“SUBMISSION OF DOUBLE QUESTION.

The notice of election for bonds ‘must state the time and place of holding the election, the amount and character of the bonds proposed to be issued and the particular purpose therefor. At such election the ballots must contain the words ‘Bonds—yes; Bonds—no’; and in voting the elector must make a cross thus ‘X’ opposite the answer for which he intends to vote.’

Sec. 3455, Revised Codes.

There is no statute against the submission of a double question. [87]

‘The test whether questions submitted include one purpose or more is whether the objects for which bonds are to be issued have a natural or necessary

connection with each other; and, if they have not, two purposes cannot be made one by verbal connection.'

Stern v. Fargo, 26 L. R. A. (N. S.) 265, opinion 666;

Blaine v. Hamilton, 116 Pac. 1076, 35 L. R. A. (N. S.) 577.

On page 579 the Court says:

'The true criterion is, are the several parts of the project so related that, united they form in fact but one rounded whole?'

Tullock v. City of Seattle, 124 Pac. 481, opinion, page 483.

The Supreme Court of Montana in a case arising over the submission of an amendment to the constitution providing for the Initiative and Referendum disposes of this contention in *State ex rel. Hay v. Alderson*, 49 Montana, 387. It was contended that two questions were submitted upon two distinct and separate purposes not dependent upon or connected with each other and that they were submitted as one question and for that reason the amendment was void. The Court admitted that 'Persons who approved the Initiative and not the Referendum, or vice versa were obliged to take both or neither.' (Opinion, 407.) And the court said on page 407 'But this circumstance is not fatal if they were both parts of a single plan or general purpose; such divergencies of opinion are conceivable as to any amendment involving particularization. 'The unity of object is to be looked for in the ultimate end, and not in the detail or steps leading to the end.' '' (Citing *Lobaugh v. Cook*, 127 Iowa, 181, 102 N. W. 1121.)

The purpose of the \$100,000 Refunding bonds and the \$136,000 New Water Bonds is the same. It is to make the indebtedness for a water system of \$235,000 and to provide for the payment of the principal and interest on both bond issues from a common fund derived from the income from the water plant and the one mill additional tax levy.

Both the Constitution and the Statutes provide that the municipality in creating such a debt must devote the revenues derived therefrom to the payment of the debt.

Sec. 6, Art. 13, Constitution of Montana;

Par. 64, Sec. 3259, Revised Codes of Montana.

The former council had already provided that the income should be devoted to the payment of the former bond issue. In order to provide for the use of this income toward the payment of the new bonds for the water system it is necessary to take up the \$100,000 outstanding Water Bonds and make one issue of \$235,000 for which the fund above mentioned is equally applicable. Whether you call this refunding (for which there is ample authority without submission to the vote of the electors who are also tax payers) or by any other name the object is the same.

[88]

Bonds which are issued to fund a valid indebtedness neither create any debt nor increase the debt of the municipality which issues them. They merely change the form of an existing indebtedness.

28 Cyc. 1583.

The indebtedness is not in excess of the Constitutional limitation.

Any indebtedness (except for water and sewer purposes) exceeding three per centum of the value of the taxable property in the city and all bonds and obligations in excess of such amount are void. Cite Sec. 6, Art. 13, Const. of Montana.

The ten per cent in addition to the three per cent is for the sole purpose of providing a water system and sewers. It cannot be used for any other purpose.

Butler v. Andrus, 35 Mont. 575;

Lepley v. City of Fort Benton, 154 Pac. 710-711.

Any indebtedness for general purposes in excess of the three per cent is void. Being void it is in fact no indebtedness and cannot be counted for any purpose whatever.

28 Cyc. 1583.

In *Ashuelot National Bank v. Lyon County*, 81 Fed. Rep. page 127, the Circuit Court of the Northern District of Iowa in an opinion by Justice Shiras held that bonds of a municipal corporation, which are void because in excess of the constitutional limit of indebtedness, are not to be counted in estimating the indebtedness of the corporation, with reference to the validity of another issue of bonds. It is clear that the new water and sewer bonds are within the additional ten per cent. Any purported indebtedness, including the \$166,000 Funding Bonds, in excess of the three per cent being void cannot be counted so as to reduce the ten per cent additional. To do so would be to allow an indebtedness to be incurred for other purposes than water and sewer purposes in excess of the three per cent and would nullify the

plain intention of the constitution and statutes of the state.”

Whereupon Defendants’ Exhibit No. 2, being a letter from Pershing, Titsworth & Fry to the plaintiff Sweet, Causey, Foster & Company, dated June 12, 1916, was admitted in evidence, and read as follows:

**Defendants’ Exhibit No. 2—Letter, June 12, 1916,
Pershing, Titsworth and Fry to Sweet, Causey,
Foster & Co.**

“We have examined with care the memorandum handed us by you containing the notes and authorities given to your Mr. Phillips by the mayor and city attorney of Bozeman, concerning the objections we raised as to the legality [89] of the proposed \$235,000 Waterworks and Refunding Bonds.

First, with reference to the double question. The cases cited in the memorandum are:

Stern vs. Fargo, 26 L. R. A., N. S., 665;

Blaine vs. Hamilton, 116 Pac. 1076; 35 L. R. A.,
N. S., 577;

Tullock vs. City of Seattle, 124 Pac. 481;

State ex rel. Hay vs. Alderson, 41 Mont. 385;

Lobaugh vs. Cook, 127 Ia. 181.

It seems to be conceded that a double question cannot be submitted as one question. The Statutes of Montana, Section 3455, require the particular purpose, the amount and the character of the bonds to be issued, to be stated in the notice for the election. This certainly requires singleness of purpose in each bond election. A statement of our own views under the circumstances would probably be of little assistance to you, and we will try to confine ourselves to

a consideration of the authorities cited. We cannot, however, see how borrowing money to pay an outstanding indebtedness is in any way related to the question of borrowing money for the purpose of constructing new works.

The case of *Stern vs. Fargo*, *supra*, we had already cited in support of our position that this was a double question, and therefore the election was invalid. In that case the question was the issuance of bonds for improving a waterworks system and erecting an electric plant in connection with the pumping plant of the waterworks system.

The Court held that this was a double proposition.

The case of *Blaine v. Hamilton* is from the Supreme Court of Washington. The question there submitted was the issuance of certain bonds for harbor improvements. In the ordinance there was set forth the amount of money proposed to be used in connection with the separate items going to make up the entire harbor improvement. The court held that the purpose of the issuance of the bonds was for harbor improvements and therefore the purpose was single, but the case cites with approval a case formerly decided by the same court, namely, *McBryde vs. Montesano*, 7 Wash. 69, 34 Pac. 559.

In *Tullock vs. City of Seattle*, the question submitted was the issuance of bonds for the purpose of acquiring a street railway system. The ordinance submitting the question directed the officers to purchase certain railway tracks if they could under certain conditions, and if not to construct a railway track along said streets. It was contended that this

made the question double. The court held that it was not; that the purpose was to acquire a street railway system. This case also cites with approval the case of *McBryde v. Montesano*.

The case of *McBryde vs. Montesano* was upon the very question here involved, namely, the issuance of bonds a part of which were to be used for the payment or refunding of an outstanding indebtedness, and the balance for new improvements. The court held that this was a double proposition [90] and invalidated the election because it was submitted all as one question and the voters had to vote either for or against the whole proposition. 'That is the situation in this case. If these Washington cases are to be followed then our position that this election was invalid, is well taken and none of the bonds can be issued thereunder.

It is probably true that the refunding bonds could be issued without any election, and that same situation was considered in the last Washington case cited.

The case cited from the Supreme Court of Montana is upon an entirely different subject, as well as is the case of *Lobaugh vs. Cook*, *supra*. They involved questions concerning the amendment of the constitution of the state and the claim in the Montana case was made that the initiative and referendum were two different propositions, and therefore the submission of the question was improper under section 9, article XIX of the constitution which is as follows:

'Should more amendments than one be submitted

at the same election they shall be so prepared and distinguished by numbers or otherwise that each can be voted upon separately.'

The Court holds that the contention is of sufficient merit to completely justify the reference of the question to the Court. The opinion also states that in the case of statutes passed by the Legislative Assembly and assailed as unconstitutional, the question is not whether it is possible to condemn but whether it is possible to uphold, and we stand committed to the rule that a statute 'will not be declared unconstitutional unless its nullity is placed in our judgment beyond reasonable doubt. The application of this rule is especially commended in the case of an amendment to the constitution solemnly and decisively adopted, the invalidity of which is charged to the method of its submission and made dependent upon a possible theory of its nature.

When we come to a city, however, exercising powers granted to it, or claimed to be granted to it, the rule is that such powers are to be strictly construed. In the Montana case, *supra*, the court finally held that the one subject involved was legislation and therefore it was properly only one amendment.

There seem to be no Supreme Court decisions of Montana passing directing upon the question involved. It was decided in the case of *Carlson vs. City of Helena*, 102 Pac. 39, that article XIII, Section 6 of the constitution requiring a municipality to devote all revenue derived from the waterworks which it is thereby authorized to acquire, to the payment of the debt incurred therefor, does not impli-

edly prohibit the granting of power to a municipality to make additional provision for the payment of the debt. The same case further decides that bonds issued for supplying the city with water are the general obligations of the city, and that the full faith and credit of the city was by law pledged for their payment. Therefore, we can see nothing in the argument that these questions are related because the revenue derived from operating the water system should be applied [91] to their payment. If such an argument were correct, any number of different propositions could be submitted at the same election, because it might be said that they were all to be paid out of general taxation, and that therefore they were all related.

The question submitted contained absolutely two distinct propositions. First, the issuance of bonds to pay the already existing and outstanding debt. Second, the issuance of bonds for extending, improving and enlarging the present waterworks system and acquiring an auxiliary or additional waterworks system from Bozeman Creek.

There is a great deal of room for saying that even the latter part of the question is illegal under the case of *Carlson vs. City of Helena*, *supra*, upon which point see page 46 of 102 Pacific. The last part of this question would seem to come within the matter condemned in such decision.

After considering these authorities carefully, we still believe firmly that this question was improperly submitted and that valid bonds cannot be issued thereunder.

As to the question of the debt limit. It is true that bonds issued to fund a valid indebtedness neither create any debt nor increase the debt of a municipality, but funding or refunding bonds when outstanding and representing a debt of a municipality are to be taken into consideration when it is proposed to create further indebtedness. Thus the funding of the \$100,000 outstanding waterworks bonds does not create an indebtedness to the extent of \$100,000 but it recognizes the existence of such indebtedness and such indebtedness must be taken into consideration in determining the power of the municipality to create further indebtedness.

The statement of indebtedness of the city contained in the proceedings published by it and marked therein Exhibit "E" and certified by the Clerk to be a true and correct financial statement of the city, includes bonds issued for warrant funding, amount \$166,000. Therefore a person examining this record must consider that such funding bonds are a valid indebtedness of the city. The various items of indebtedness which they go to make up may all have been valid, and yet if it had been attempted to create the total amount of the debt at any one time it could not have been done, so no one can say that the funding bonds are illegal. Their legality depends upon the legality of the debt for which the warrants were issued and for which the funding bonds were issued. If they were issued for an absolutely illegal indebtedness and are themselves illegal it is possibly true that they should not be considered in determining the validity of the funding bonds issued, although this

(Testimony of C. N. Phillips.)

question is not free from doubt.

The federal case cited, namely, *Ashuelot National Bank vs. Lyon County*, 81 Fed. 187, involved the right of a person to collect bonds after they were issued. It is very doubtful, however, that the City could claim that an obligation voluntarily incurred by it is illegal for the purpose of permitting it to incur further obligations, and especially is this true when the city is seeking to [92] compel a person to purchase bonds and has given him to understand that the prior indebtedness is a valid outstanding indebtedness against the city. Upon the face of the record these funding bonds constitute a legal indebtedness of the city, recognized by it to be such, and therefore must be considered in determining the city's power to borrow further money or to create further indebtedness."

The WITNESS.—I was not present myself at Bozeman at the time of the purchase of the bonds involved in this suit. I think I arrived there June 10, 1916. I went there to confer with the officers of the City of Bozeman for the purpose of trying to straighten the matter out and accept the bonds if possible, and to talk over the subject. At that time Mr. John A. Luce and Mr. Kremer, both being present, explained to me the nature of the \$166,000 of funding bonds issued by the City of Bozeman, July 1, 1914. I do not remember that that subject was gone into in detail, but I think they made some verbal statement of the general character of that indebtedness. So far as I recall I was given to understand

(Testimony of C. N. Phillips.)

that that was a general indebtedness, and not a water or sewer indebtedness. I am not very clear on that. I understood that none of the indebtedness was indebtedness which had been authorized by an election for water or sewer purposes.

Defendants' Exhibit No. 3 is a letter signed by me for my firm, Sweet, Causey, Foster & Company, one of the plaintiffs, and handed to the Mayor of the City of Bozeman, the defendant John A. Luce, personally. Defendants' Exhibit No. 4 appears to be a copy of a letter handed to the City Clerk of the City of Bozeman on the day of its date at the city council meeting.

Whereupon Defendants' Exhibit No. 3, being a letter from the plaintiff Sweet, Causey, Foster & Company, by the witness C. N. Phillips, to the City of Bozeman and the Hon. John A. Luce, Mayor, dated June 10, 1916, which is set out [93] at length in paragraph 6 of the affirmative defense of the defendants in the answer (see page —) was admitted and read in evidence.

Whereupon defendants' Exhibit No. 4, being a letter from the plaintiff Sweet, Causey, Foster & Company, signed by the witness C. N. Phillips, to the City of Bozeman and the Honorable Mayor and City Council, dated June 15, 1916, was admitted and read in evidence as follows:

Defendant's Exhibit 4—Letter, June 15, 1916, Sweet, Causey, Foster & Co. to City of Bozeman.

“The writer handed to your Mayor yesterday letter from our attorneys, dated June 12, 1916,

being their reply to the memorandum which he dictated June 10, after submission on that day to your Mayor and City Attorney of the opinion from our Attorneys, dated June 7, 1916, upon the legality of the proceedings furnished us in relation to the proposed \$305,000.00 municipal bonds of the City of Bozeman. Upon their same opinion again expressed in the above-mentioned letter from our attorneys, addressed to the City of Bozeman, John A. Luce, Mayor, and handed personally to the Mayor on that day by the writer, by reaffirming our announcement in that letter of our rejection of the legality of said proceedings.

Neither this letter nor our letter to your City of June 10, 1916, nor our submission of the proceedings to our Attorneys, nor any actions which we have taken or may take, shall be construed as in any manner whatever waiving or prejudicing our position announced in our telegram of May 22, 1916, to your Mayor and confirmed by this and other communications, namely; that Mr. L. E. Torrence had no authority to sign on behalf of our associates and ourselves the purported agreement of May 18, 1916. He had no authority to bid for the said bonds, except strictly subject to the approval of our Attorneys as to the legality.

We now make demands upon you for the prompt return of our certified checks, aggregating \$4,000.00, deposited with the City of Bozeman."

(Testimony of C. N. Phillips.)

The WITNESS.—I appeared before the City Council of the City of Bozeman on June 15, 1916, and was asked by the Mayor whether or not the plaintiff Sweet, Causey, Foster & Company would accept the bonds involved in this suit, and I refused to answer.

And thereupon the plaintiffs rested their case.
[94]

Whereupon the attorneys for the defendants, to maintain and prove the said issue on their part, offered the following evidence, to wit:

Testimony of D. S. McLeod, for Defendants.

D. S. McLEOD was called as a witness on behalf of the defendants, and having been duly sworn, testified as follows:

Direct Examination.

The WITNESS.—I reside at Bozeman, Montana, and occupy the official position of County Clerk and Recorder of the County of Galatin, in which said City is situated. I have occupied that position since January 1, 1917. I am able to give to the Court the equalized assessed valuations of property of all kinds in the City of Bozeman for the years 1898, 1910, 1911, 1912, 1913, 1914 and 1915.

Q. Just state to the court those equalized assessed valuations of property in the City of Bozeman, Montana.

Mr. DAY.—To which we object as immaterial and irrelevant for the reason that these bonds were issued subsequent to the equalized assessment of 1915, and

(Testimony of D. S. McLeod.)

the assessed valuation of that year was contained in the statement furnished the plaintiffs, a copy of which is attached to the complaint of the plaintiffs, and admitted in the answer to be correct, and the assessed valuation of previous years is immaterial to any issue in this case in that these bonds are based upon the last previous valuation. The plaintiff further objects to this evidence for the reason that these facts of which the witness is asked—the condition of the indebtedness of the City at the dates referred to—were not submitted to the bidders in the certified statement of the record of the City and that the purchaser or bidder on the bonds was not bound to take judicial notice of the original indebtedness which formed the basis of the refunding bonds mentioned in the certificate. [95]

Objection overruled.

The WITNESS.—The total assessment of the City of Bozeman, Montana, for the year 1898, after being equalized, was \$1,917,655. For the year 1910 it was \$2,932,125. For the year 1911 it was \$2,971,234. For the year 1912 it was \$2,966,908. For the year 1913 it was \$3,044,198. For the year 1914, it was \$3,147,966. For the year 1915 it was \$3,209,196. For the year 1916 it was \$3,234,136.

Testimony of John L. Ketterer, for Defendants.

Whereupon JOHN L. KETTERER, was called as a witness on behalf of the defendants, and having been duly sworn, testified as follows:

Direct Examination.

The WITNESS.—I reside at Bozeman, Montana,

(Testimony of John L. Ketterer.)

and am now, and since the first Monday in May, 1913, continuously have been, the City Treasurer of the defendant the City of Bozeman. I have in my possession as such officer, and under my control, the records of the City of Bozeman showing its indebtedness of various kinds, which show its financial condition in a general way.

Q. I will ask you to state to the Court the amount of the net indebtedness of the City of Bozeman on the 1st day of January, 1899.

Mr. DAY.—To which we object as immaterial and irrelevant to any of the issues in this case in that the rights of the parties are fixed by the outstanding indebtedness at the time of the passage of the resolution for the issuance of the bonds in controversy.

Objection overruled.

The WITNESS.—The net indebtedness of the City of Bozeman on January 1, 1899, was \$57,912.51. None of that [96] indebtedness was for either water or sewer bonds. It was merely the general indebtedness of the City. The original issue of water bonds by the City of Bozeman were dated January 1, 1899, and the issue was in the amount of \$165,000. The indebtedness which I have given was the indebtedness of the City just before that issue of bonds was made.

The outstanding net indebtedness of the City of Bozeman on January 1, 1911, was \$81,689.40, and that excludes water and sewer bonds. There were never any bonds issued by the City of Bozeman for

(Testimony of John L. Ketterer.)

sewer purposes until the issue in question in this suit, and there were never any water bonds issued by the City of Bozeman other than the issue of \$165,000 that I spoke of of January 1, 1899, besides those which are involved in this suit.

The net outstanding indebtedness of the City of Bozeman on January 1, 1912, was \$116,730.89.

The net general indebtedness of the defendant City of Bozeman on January 1, 1913, was \$80,965.75.

The net general indebtedness of the defendant City of Bozeman on January 1, 1914, was \$159,510.33.

The net general indebtedness of the defendant City of Bozeman on June 30, 1914, was \$166,925.81.

The net general indebtedness of the defendant City of Bozeman on June 30, 1916, was \$180,421.48.

All of the figures given above refer to general indebtedness of the City of Bozeman, and none of them include any water or sewer bonds or indebtedness. The statement of June 30, 1916, includes the issue of funding bonds of July 1, 1914, to the amount of \$166,000. The statement of June 30, 1914, was the net indebtedness of said city just before that issue [97] of bonds. That issue of \$166,000 of funding bonds covered general warrants that were issued from January 3, 1911, up to and including April 30, 1913, and warrants that had been issued after that time to the construction company for street work. In funding those warrants the funding bonds took up both principal and interest of the warrants. The principal of the warrants funded amounted to \$150,855.90, and there was also \$15,720.46 of interest.

(Testimony of John L. Ketterer.)

The warrants funded bore 6% interest. In issuing the funding bonds, the warrants were taken up, principal and interest, and the funding bonds issued in lieu thereof. The warrants funded by said issue of July 1, 1914, were not in any way connected with water or sewer bonds, and did not include any water or sewer indebtedness.

On June 30, 1916, there remained outstanding the \$100,000 of the \$165,000 original issue of water bonds dated January 1, 1899. The rest of that issue had previously been retired. I have already stated that on June 30, 1916, there were no outstanding bonds for sewers, and never had been any. There were no other water bonds outstanding at that time other than those I have mentioned. There was also no water or sewer indebtedness at that date.

Cross-examination.

The WITNESS.—I have been City Treasurer since the first Monday in May, 1913. The interest has been regularly paid on this issue of funding bonds. To my knowledge the City of Bozeman has never repudiated the obligation created by this issue of funding bonds, and to my knowledge there has been no suit brought to restrain the payment of interest and principal on any of these funding bonds.

Redirect Examination.

The WITNESS.—I am not in a position to know what the City [98] might or might not do in respect to repudiating of indebtedness, or suits

(Testimony of C. A. Spieth.)

brought, or anything of that kind. All I know is what the records in my office show.

Testimony of C. A. Spieth, for Defendants.

Whereupon C. A. SPIETH, one of the defendants, was called as a witness on behalf of the defendants, and having been duly sworn, testified as follows:

The WITNESS.—I reside at Bozeman, Montana, and occupy the position of City Clerk of the City of Bozeman, in the State of Montana. I have occupied that position since the first Monday in May, 1915. I was Deputy City Clerk to the first Monday in May, 1915, when I was appointed City Clerk. I had been Deputy City Clerk for one year previous to that date. I have been either City Clerk or Deputy City Clerk during all of the period of the proceedings and up to the time of the issuance of the bonds in controversy in this case.

The COURT.—When were these proceedings started?

Mr. KREMER.—In February, 1916, I believe.

The WITNESS.—The date of the original sale of the bonds when the plaintiffs in this case purchased them was May 18, 1916. Prior to that date my office had prepared a transcript of the proceedings for the water bonds and proceedings for the sewer bonds, and mailed a copy thereof to each firm of prospective bond buyers requesting them. Among those firms was the plaintiff Sweet, Causey, Foster & Company. I am not able to answer positively when I sent that copy of the transcript of the proceedings, but it was within a period of three weeks prior to the date of

(Testimony of C. A. Spieth.)

the sale, which occurred on May 18, 1916. It is my recollection that I mailed a copy also to the plaintiff C. W. McNear & Company, but as to the plaintiff James N. Wright & Company, I do not remember. I also sent out a financial statement of the [99] City of Bozeman; a copy of such financial statement was attached to each copy of the proceedings. Exhibit "E," which is attached to the original bill of complaint in this suit is a copy of the financial statement then sent out to prospective bond buyers. In explanation of the various indebtednesses listed there, I will say that the \$100,000 of bonds issued for water, 5%, due January 1, 1919, were the bonds that remained of the old water bonds, and those are the \$100,000 of water bonds that were refunded in the issue in question in this case. The \$21,000 is for City Hall funding bonds, 4%, due January 1, 1921. That is what remained at that time of funding bonds for the purpose of building the City Hall. The \$166,000 was bonds issued for funding purposes to fund the general indebtedness of the City of Bozeman. That is the issue of July 1, 1914, referred to by Mr. Ketterer. That issue funded the warrants for general purposes for the City of Bozeman issued between January 3, 1911, and the date of the issuance of those bonds. The other item of \$286,386.13 was for all improvement districts, and that was indebtedness which existed against the several improvement districts for special improvements made under the laws of the State of Montana. Those indebtednesses are a lien upon the property improved,

(Testimony of C. A. Spieth.)

and there is no assessment in the assessment for general taxes for the purpose of retiring that indebtedness, but that is taken care of by the property specially taxed against which it is a lien.

I have my minutes of the meeting of the City Council of the City of Bozeman of May 18, 1916, at which time the bonds were offered for sale. Confining myself to so much of the body of the minutes as has reference to the bonds in question in this [100] suit, those minutes read as follows:

“The Mayor announced that this was the time and place designated by published notice for the auction of the Water and Sewer Bonds and that the regular order of business be suspended and we proceed with the auction, and further announced to the representatives of bidders present, that the successful bidder would be required to enter into a written contract with the City immediately upon the conclusion of the sale of these bond issues, whereby such successful bidder would bind himself to take such bond issue or issues at the amount or amounts bid and that he would have two weeks in which to examine into the legality of the proceedings pertaining to these bond issues and then he must announce his acceptance or rejection thereof, as to the legality of said proceedings. The successful bidder to further agree that if he then assert that said proceedings are illegal, he must in fact, establish such illegality. And if the proceedings are in fact legal and said purchaser shall refuse to accept such bonds at the purchase price thereof, then the City will

(Testimony of C. A. Spieth.)

retain the amounts of the certified checks of the successful bidder as liquidated damages; but if the said proceedings are in fact illegal, the successful bidder must furnish the blank bonds free of expense pay the purchase price thereof.

The Mayor further announced that the successful bidder must furnish the blank bonds free of expense to the City for these issues. He further announced that the bids must be in dollars, representing the amount of the premium bid over and above par. He stated further that the Ordinances prescribing the forms of the bonds, as the same will be passed by the City Council, were on the City Clerk's desk and could be examined by any prospective bidder before the opening of the auction, and further authorized the Clerk to open the sealed bid of the International Trust Company of Denver, which bid, failing to be accompanied by the required certified checks, was ordered not to be considered.

Thereupon the oral auction began.

The following are the bids for Water Bonds:

J. D. Neale, representing Lumbermen's Trust Company of Portland, Ore., par and \$2500.00.

A. R. Clark, representing Harris Trust & Savings Bank of Chicago, Ill., par and \$9590.00.

L. E. Torrence, representing Sweet, Causey, Foster & Co. of Denver, Colo., par and \$9595.00.

For Sewer Bonds:

J. D. Neale, representing Lumbermen's Trust Company of Portland, Ore., par and \$1450.00.

A. R. Clark, representing Harris Trust & Savings

(Testimony of C. A. Spieth.)

Bank, of Chicago, Ill., par and \$2830.00.

L. E. Torrence, representing Sweet, Causey, Foster & Co. of Denver, Colo., par and \$2835.00.

On motion of Alderman Truitt, seconded by Alderman Burke, the bid of Sweet, Causey, Foster & Co., of Denver, Colo., of par and \$9595.00, with accrued interest, for Water Bonds, and par and \$2835.00, with accrued interest, for Sewer Bonds, being the highest bids, were accepted, and the Mayor and City Clerk were authorized to enter into a contract with the bidder as [101] per the instructions and conditions of the auction sale, bidder to furnish Bonds, by the following 'aye' and 'no' vote, those voting 'aye' being Alderman Burke, Fuller, Gibson, Hines, Holm, O'Connell, Pratt and Truitt, those voting 'no,' none."

The WITNESS.—That is all in that set of minutes. Those minutes were approved by the proper officers. I was present at that time, and recall that that is what actually occurred at that time. Copies of the further ordinances to be passed by the City Council to cover such further proceedings as would have to be taken later to complete the issuance of bonds were then in the council room for examination. Mr. L. E. Torrence is the man who represented the plaintiff Sweet, Causey, Foster & Company at that time. He was present in person, and it was he who delivered the two checks for \$2,000 each to me.

Cross-examination.

The WITNESS.—The minutes correctly show what

(Testimony of C. A. Spieth.)

took place at the meeting. There was an auction of the bonds. No other sealed bid was offered except that of the International Trust Company of Denver, mentioned in the minutes. While the minutes only show one bid of each person, I still have the original list in my possession here, where each and every one bid their various amounts. The minutes do not show that; I have that on a separate sheet. There were different bids. They started on par and bid \$5 at a time. The minutes do not show that, but as a matter of fact that did take place.

I made this statement which I mailed to the intended bidders over my signature as City Clerk. The statements therein contained were correct to the best of my knowledge and belief. I stated that no previous issue of bonds had been contested, and that statement is true to the best of my knowledge and belief. There are no records in my office that I know of to show any contest of previous bond issues. To the best of my knowledge, the principal [102] and interest of bonds have always promptly been paid at maturity, and there are no records of the failure of the City of Bozeman to pay the coupons or principal of this issue of \$166,000 of bonds. To the best of my knowledge and belief there is no litigation pending or threatened, affecting the validity of the City's bonds. There are no records in my office of any kind showing that any contest has been commenced or threatened against this issue of \$166,000 of bonds, that I know of.

(Testimony of C. A. Spieth.)

There has not at any time been filed in my office any protest against that issue of bonds, either before or after its issue, and sale, that I am aware of.

I have in my possession the original ordinances fixing the form of the funding bonds, being the \$166,000 issue; the closing paragraph on page 2 reads as follows:

“It is hereby certified and recited that this bond is issued in strict compliance with and conformity to the laws and Constitution of the State of Montana, and that all acts, conditions and things required to be done precedent to the issuance of this bond have been properly and legally done, had and performed, and the full faith and credit of said City are hereby irrevocably pledged to the payment of this bond, according to its terms.”

The bonds issues in pursuance of that ordinance bore the signatures of the Mayor and City Clerk and the seal of the City. The ordinance requires the bonds to be so executed.

Redirect Examination.

The WITNESS.—While my minutes do not show it, there was competitive bidding by the bidders whose names are stated in the minutes of May 18, 1916, and that is simply the final result of it. They went from par up \$5, at a time. I couldn't state the second amount but they all originated at par, and competed from there. There was public bidding to reach the results recorded. I have a record showing the figures of the different bids. [103]

Testimony of Harry D. Kremer, for Defendants.

Whereupon HARRY D. KREMER was called as a witness on behalf of the defendants, and having been duly sworn, testified as follows:

Direct Examination.

The WITNESS.—I resided at Bozeman, Montana, and occupy the official position of City Attorney of said City, which position I have held since May 3, 1915. I was acquainted with Mr. L. E. Torrence, who is spoken of in this case as the representative of the plaintiff Sweet, Causey, Foster & Company, and I have also been acquainted with Mr. C. N. Phillips, the representative of said plaintiff, who has testified in this case, since June 10, 1916. I was present at the meeting of the council of May 18, 1916.

These issues of bonds were naturally largely in the hands of the Mayor, who was an attorney, and myself, and until the day of the sale we had not determined upon what restrictions, if any, we would put on the purchaser of the bonds, or what conditions we would sell them under. On the day of the sale Mr. Clark of the Harris Trust and Savings Bank, a man representing the Lumbermen's Trust Company, of Portland, and the Minnesota Loan & Trust Company, and also Mr. Torrence, representing the Sweet, Causey, Foster Company, wanted to know if we were going to sell the bonds conditionally or unconditionally as to legal proceedings; and after the Mayor and the finance committee and I had a conference, and after I had been informed by Mr. Torrence, a man representing the Lumbermen's

(Testimony of Harry D. Kremer.)

Trust Company and also Mr. Clark, of the Harris Trust & Savings Bank, that all three of them had had opinions from their attorneys, and that they were ready to make unconditional bids for the bonds, we felt that if we did not put any restrictions on that we would probably [104] get a better price. Mr. Clark had an opinion with him from Messrs. Wood & Oakley, the law firm mentioned by Mr. Phillips. It was on their stationery, and the same stationery that appears in one of these exhibits. I have not the original of that in my possession, but I have had it in my possession, and had opportunity to examine it. It was signed by the same Mr. Wood. I returned it to Mr. Clark. The letter was addressed to the Harris Trust & Savings Bank, in which Mr. Wood stated on behalf of the firm of Wood & Oakley that the proceedings pertaining to these two questions were lawful, and he would approve them, providing the proceedings showed that the County Attorney of Gallatin County had given his approval of the proceedings, and providing the proceedings showed that the offer to sell bonds had been made to the State Land Board, and providing the ordinance prescribing the forms of the water bonds divided them into two different forms of bonds, one for refunding and one for the \$135,000 additional indebtedness. And taking into consideration all of those conversations, and believing that we would get better bids by having no restrictions, the announcement was made as the clerk read it.

I prepared the transcripts that were sent to Sweet,

(Testimony of Harry D. Kremer.)

Causey, Foster & Company, and which they acknowledged the receipt of. Those transcripts had with them the necessary letter by the County Attorney, made as an original, and also had the refusal of the State Land Board to purchase any of these issues, and the forms of bonds were subsequently drawn according to the ideas expressed by Mr. Wood, or Wood & Oakley. There was nothing said in that conversation on May 18, 1916, as to the \$166,000 of funding bonds except by the representative of the Minnesota Loan & Trust Company. Mr. Torrence was not present at that time. The matter was not raised nor discussed with [105] Mr. Torrence. Mr. Torrence told me, "I have an opinion from the attorney that they are valid, and I am ready to bid on these bonds." They had then had this financial statement in their possession at least two weeks.

The night after the sale, while the Council was in session, I drew this contract. Mr. Torrence and I had a conversation. We talked about what should be said in the contract, or what should not be. He indicated what he would like to have in the transcript, so that it would be complete, and what he asked for was furnished later by me in the transcript. I got up the transcript, and of course it was certified to by the City Clerk. That was the last conversation I had with Mr. Torrence, but on June 10 I had a conversation with Mr. Phillips, and had other conversations with him on June 14, and June 15, 1916. On June 10, following a telegram

(Testimony of Harry D. Kremer.)

from Sweet, Causey, Foster & Company, saying he would come to Bozeman on that day to talk to us about these bonds, he came to the office of the Mayor, and the Mayor 'phoned me and I went up. He had with him this opinion of Pershing, Titsworth, & Fry, dated June 7, and we explained to him as fully as could be explained the basis of the \$166,000 indebtedness, and that was gone into in detail. We told him that none of it was for water or sewer purposes. We then drew that brief and gave it to him, with the request that he send it to Sweet, Causey, Foster & Company, and that they give it to their attorneys, and we felt that they would be convinced of the legality of the proceedings, after they were informed as to the exact basis of the \$166,000 indebtedness. Then Mr. Phillips went to Billings for several days, and came back on the 14th, and had with him the reply to our brief—a reply, you might say, to our conversation with him—and notwithstanding our [106] explanation of the \$166,000 indebtedness, their attorneys assumed that that was a valid indebtedness of the City. On June 15, we had a council meeting, and Mr. Phillips was present and addressed the council, and when we asked him whether he wanted the bonds, or would take them, he refused to say. I have not stated the conversations with the various representatives of the plaintiff Sweet, Causey, Foster & Company in full, but have stated everything that now appears to me to be pertinent to this matter.

I have personal knowledge of the subsequent sale

(Testimony of Harry D. Kremer.)

of the bonds involved in this case. Within a few days following this meeting of the City Council attended by Mr. Phillips, I sent telegrams to a number of bond houses, asking them to make an *officer* for these bonds, stating that they had been rejected by Sweet, Causey, Foster & Company, and I had various replies. The reply that seemed most likely to produce results was one from Harris Trust & Savings Bank, of Chicago, offering par and 3%, subject to acceptance within twenty-four hours. I notified the Councilmen, and the Mayor was away. The acting Mayor called a special meeting of the Council for two o'clock that afternoon, and we sold the bonds to the Harris Trust & Savings Bank, and wire them to that effect. We went ahead then to get up the transcripts and attend to all of that business, and they wrote back that they understood their attorneys had practically approved of the entire issue. While Mr. Luce and I were in Butte on the 20th of July, at the hearing relative to the injunction in this case, the Harris Trust & Savings Bank telegraphed to the City Clerk to have a copy of the pleadings and information relative to this case, and he, not having them, simply wired them a statement of the matter, [107] and, in short, when they had full knowledge of the case, they would not fulfill their part of the contract and take the bonds, without a final judgment in this case. They took considerable time negotiating back and forth, and finally about the 1st of September, 1916, we broke

(Testimony of Harry D. Kremer.)

off negotiations entirely with the Harris Trust & Savings Bank.

I went to Butte then within a few days, and sold the bonds to James A. Murray at par, I think on the 3d of September. I was representing the City of Bozeman. The bonds were actually delivered to James A. Murray of Butte, and the money was paid to the city.

Mr. Luce and I repeatedly said to Mr. Phillips that we would do anything that would make these bonds legal that we could do, but the things they were asking of us would result in making an entire new issue of bonds, and were not to cure any alleged invalidity of the bonds. We made that offer at various times in conversations we had with Mr. Phillips.

Mr. PATTEN.—At this time I ask leave to amend paragraph 14 of the answer, on page, by striking out from the last of that paragraph the following: "The said City of Bozeman has sold said bonds to the Harris Trust & Savings Bank, of Chicago, Illinois, and said bonds have been printed and will be signed and delivered to and accepted by said Harris Trust & Savings Bank as legal, upon the proceedings claimed to be illegal by plaintiffs herein," and in lieu thereof ask to insert: "The said City of Bozeman has sold said bonds to James A. Murray, of Butte, Montana, and said bonds have been printed, signed and delivered, and accepted by said James A. Murray, as legal, upon the proceedings claimed to be illegal by plaintiffs herein." Also to amend para-

(Testimony of Harry D. Kremer.)

graph 7 of the affirmative defense of the defendants by striking out from the last of said paragraph the following: "Proceeded [108] to and did sell the said bonds to the Harris Trust & Savings Bank, which bank has agreed to accept said bonds as legal," and to insert therein in lieu of the matters stricken out the following: "Proceeded to and did first sell the said bonds to the Harris Trust & Savings Bank, which bank agreed to accept said bonds, but did not complete the purchase thereof, and thereafter sold and delivered said bonds to James A. Murray, of Butte, Montana, who accepted the said bonds as legal." I do not think this a very material amendment, but in view of the testimony, and as a part of the history of the case, it probably will be well to have the correct facts stated.

Mr. DAY.—To which amendments plaintiffs object, so far as any sale to James A. Murray is concerned, for the reason that the testimony shows the sale to Murray was pending, but there is no authority in law for the sale of municipal bonds at private sale, and the bonds in the hands of Mr. Murray are absolutely void, they are still in the possession of Bozeman, it appearing that the supposition that the bonds had been sold to Harris is incorrect.

The COURT.—The objection will be overruled, *pro forma*, and the amendments allowed. If not entitled to any consideration by the Court, it will receive none, and we will have it all in the record.

Mr. PATTEN.—You make no objection to the

(Testimony of Harry D. Kremer.)

form in which I offer the amendments.

Mr. DAY.—Oh, no.

Cross-examination.

The WITNESS.—Some of the things requested of us were things we could not do, and the others were things that if done would tend to validate the bonds. We could not reduce the city indebtedness as requested. We could have disregarded the elections [109] we had, and have had other elections. We didn't believe from a legal standpoint that anything would be gained by it. We declined to do that because we didn't think it was necessary. The statute of Montana does not prescribe any form of contract following the auction sale of bonds. It does not prescribe any auction contract at all in specific terms, to my knowledge. The Supreme Court of Montana has held that an auction may consist of several offers, without the presence of the bidders.

I have in my possession a letter of August 7 written to the City of Bozeman by Mr. Wood, declining to *approving* these bonds. I haven't here the letter from the Harris Trust & Savings Bank of August 3 declining to accept the bonds, but we have it in our file. I know the contents of it in a general way. I know that Mr. Wood declined to approve the bonds after the Harris Trust Company had bought them. The proposition submitted to Harris & Company was not whether they would take the bonds if this suit was dismissed; it was an out-and-out sale to them—an out-and-out offer by telegraph to buy them at par

(Testimony of Harry D. Kremer.)

and 3%. We held a council meeting without twenty-four hours, and accepted their offer. Mr. Wood did not state that he declined to endorse the validity of these bonds even if this suit were dismissed and the allegations in this complaint withdrawn. The Harris Company said they would consummate their contract to purchase the bonds, provided a final judgment of this case were rendered. I hadn't any conversation with them myself personally. [110]

I know of no proceedings to set aside this issue of \$166,000 of bonds.

And thereupon the defendants closed their case, and this concluded the testimony in the case.

The foregoing is presented as a statement of the evidence taken at the trial of said cause.

H. D. KREMER,
GEORGE Y. PATTEN,
Attorneys for Defendants.

Service of the above statement of the evidence is acknowledged, and copy received, this 10th day of March, 1917, and we hereby consent that the same may be settled as the statement of the evidence as of this date.

DAY & MAPES,
Attorneys for Plaintiffs.

Order Approving Statement of Evidence, etc.

The foregoing statement of the evidence contains all of the testimony, oral and documentary, introduced at the trial of said cause, is full, true and com-

plete, and is approved this 14th day of March, 1917.

GEORGE M. BOURQUIN,

U. S. District Judge for the District of Montana.

Filed Mar. 14, 1917. Geo. W. Sproule, Clerk.
[111]

That on February 27, 1917, a Citation was duly issued herein, which said original Citation is hereto annexed and is in the words and figures following, to wit: [112]

*In the District Court of the United States, District
of Montana, Helena Division.*

IN EQUITY.

SWEET, CAUSEY, FOSTER & COMPANY, a
Corporation, et al.,

Plaintiffs,

vs.

CITY OF BOZEMAN et al.,

Defendants.

Citation on Appeal.

United States of America,—ss.

To Sweet, Causey, Foster & Company, a Corporation,
James N. Wright & Company, a Corporation,
and C. W. McNear & Company, a Corporation,
GREETING:

You are hereby cited and admonished to be and appear in the Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 29 day of March, A. D.

1917, pursuant to an order allowing an appeal filed and entered in the clerk's office of the District Court of the United States for the District of Montana, upon a final decree signed, filed and entered on the [113] 14th day of February, 1917, in that said suit being in equity No. 77, wherein you are the plaintiffs and appellees, and City of Bozeman, a corporation, John A. Luce, Mayor of the City of Bozeman, and C. A. Spieth, Clerk of the City of Bozeman, are defendants and appellants, to show cause, if any there be, why the decree rendered against the said appellants, as in said order allowing appeal mentioned, should not be corrected, and why justice should not be done to the parties in that behalf.

Feb. 27, 1917.

GEO. M. BOURQUIN,

U. S. District Judge of the District of Montana.

Due service of the above and foregoing Citation on Appeal is acknowledged, and copy received, this 1st day of March, 1917.

DAY & MAPES,

Attorneys for Plaintiffs. [114]

[Endorsed]: No. 77. In the District Court of the United States, District of Montana, Helena Division. Sweet, Causey, Foster & Company, a Corporation et al., Plaintiffs, vs. City of Bozeman et al., Defendants. Citation on Appeal. Filed Mar. 1st, 1917. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy. [115]

That on March 13, 1917, Praecipe for Transcript was duly filed herein, in the words and figures following to wit:

(Title of Court and Cause.)

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please incorporate in the transcript on appeal to the Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, the following portions of the record, to wit:

The Bill of Complaint; the Answer; the Statement of the Evidence; the Opinion and Decree of the Court; the Petition for Appeal; the Assignment of Errors; Bond on Appeal; the Citation on Appeal; and the Clerk's Certificate.

H. D. KREMER,
GEORGE Y. PATTEN,
Attorneys for Defendants.

Service of the above and foregoing Praecipe acknowledged, and copy received, this 10th day of March, 1917.

DAY & MAPES,
Attorneys for Plaintiffs.

Filed Mar. 13, 1917. Geo. W. Sproule, Clerk.
[116]

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 117 pages, numbered consecutively from 1 to 117, inclusive, is a full, true and correct transcript of the pleadings, orders, opinion of the Court and decree, and all other proceedings had in said cause required to be incorporated in the record on appeal therein by the praecipe of the appellant for said record on appeal, including said praecipe, and of the whole thereof, as appears from the original records and files of said court in my possession as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Fifty 95/100 Dollars (\$50.95), and have been paid by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Great Falls, Montana, this 21st day of March, A. D. 1917.

[Seal]

GEO. W. SPROULE,

Clerk. [117]

[Endorsed]: No. 2959. United States Circuit Court of Appeals for the Ninth Circuit. City of Bozeman, a Corporation, John A. Luce, Mayor of the City of Bozeman, and C. A. Spieth, City Clerk of the City of Bozeman, Appellants, vs. Sweet, Causey, Foster & Company, a Corporation, James N. Wright & Company, a Corporation, and C. W. McNear & Company, a Corporation, Appellees. Transcript of the Record. Upon Appeal from the United States District Court for the District of Montana.

Filed March 24, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

